Petition

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No. 81-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF CALIFORNIA, et al.,

Petitioners,

v.

STANDARD OIL COMPANY OF CALIFORNIA, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Upjohn Co. v. United States (1981) 449 U.S. 383 should be extended to cover all present employees and former employees who might have information relevant to civil antitrust litigation.

2. Whether under such an extension of Upjohn corporate counsel may use the attorney-client privilege to frustrate the discovery process.

THE PARTIES BELOW

Petitioners, who were Appellees in the Court of Appeals are the States of California, Arizona, Florida, Oregon and Washington and the City of Long

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Beach. The Petitioner States are plaintiffs in the District Court. Respondents, Appellants in the Court of Appeals, are defendants in In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, MDL-150 WPG, which is pending in the United District Court for the Central District of California.[1]

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[1]The Respondents are: Amerada Hess Corporation; Atlantic Richfield Company; Cities Service Company and Cities Service Oil Company; Conoco, Inc.; Exxon Corporation; Getty Oil Company; Gulf Oil Corporation; Mobil Oil Corporation; Phillips Petroleum Company; Shell Oil Company; Standard Oil Company of California; Standard Oil Company (Indiana); Standard Oil Company (Ohio); Sun Oil Company, Inc.; Texaco, Inc.; and Union Oil Company of California.

TABLE OF CONTENTS

	Pages
QUESTIONS PRESENTED	i
THE PARTIES BELOW	i
TABLE OF AUTHORITIES	iv-vii
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT	1
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	8
The Court Below Decided Important Issues of the Federal Rules of Evidence in Ways Inconsistent With This Court's Relevant Decisions.	8
A. Upjohn Addressed a Situation Totally Different Than the One Before the Courts Below.	10
B. Upjohn Does Not Extend the Attorney-Client Privilege Beyond the "Control Group" in the Context of Pending Litigation.	11
C. The Court of Appeals' Decision Apparently Extends the Attorney-Client Privilege to Frustrate the Discovery Process.	16
CONCLUSION	20

TABLE OF AUTHORITIES

CASES	Pages
ACF Industries, Inc. v. Equal Employment Opportunity Commission (1979) 439 U.S. 1081 (Powell, J., dissenting)	13
Burlington Industries v. Exxon Corporation (D.Md. 1974) 65 F.R.D. 26	18
Clark v. State (Ct.Crim.App. Tex. 1953) 261 S.W.2d 339	18
Falsome v. United States (5th Cir. 1953) 205 F.2d 734, cert. den., 346 U.S. 864	18
Fisher v. United States (1976) 425 U.S. 391	17, 19
Harper & Row Publishers, Inc. v. Decker (7th Cir. 1970) 423 F.2d 487, affd. 400 U.S. 348	16
In re Ampicillin Antitrust Litigation, MDL-50 (D.D.C. 1978) 81 F.R.D. 377	16
In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation (C.D.Cal. 1980) 502 F.Supp. 1092	passim

TABLE OF AUTHORITIES (cont.)

CASES (cont.)	Pages
In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation (9th Cir. 1981) 658 F.2d 1355	passim
Matter of Fischel (9th Cir. 1977) 557 F.2d 209	17, 20
New York City Transit Authority v. Beazer (1979) 440 U.S. 568	9
Trammel v. United States (1980) 445 U.S. 40	9
United States v. Bryan (1950) 339 U.S. 323	9
United States v. Friedman (9th Cir. 1971) 445 F.2d 1076	18
United States v. International Business Machines (S.D.N.Y. 1979) 84 F.R.D. 651	19
United States v. Nixon (1974) 418 U.S. 683	17
Upjohn Co. v. United States (1981) 449 U.S. 383	passim
Vermont Yankee Nuclear Corp. v. National Resources Defense Council (1978) 435 U.S. 519	9
Wilkinson v. United States (1961) 365 U.S. 399	9

TABLE OF AUTHORITIES (cont.)

STATUTES	Pages
Federal Rules of Civil Procedure Rule 1	13
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1407	15

MISCELLANEOUS

Address by Richard J. Favretto, Deputy Director of Operations, Antitrust Division, before the Chicago Bar Association Antitrust Symposium, Chicago, Illinois (1977)	15
Brazil, Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses, 1980 Am.Bar.F.Res.J. 789	14
Brazil, Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery, 1980 Am.Bar.F.Res.J. 217	14
Kennedy, Special Problems in Representing the Individual Defendant, 47 Antitrust L.J. 667 (1978)	15
Recommendations of the American College of Trial Lawyers on Major Issues Affecting Complex Litigation, 90 F.R.D. 207	16

TABLE OF AUTHORITIES (cont.)

MISCELLANEOUS (cont.)	Pages
Ridge, The Organization of a Big Case - The First Pre-Trial Conference, 21 F.R.D. 406	15
Sims, Criminal and Civil Antitrust Litigation: A Prosecutor's Perspective, 46 Antitrust L.J. 690 (1977)	15
Slovak, The Ethics of Corporate Lawyers: A Sociological Approach, 1981 Am.Bar.F.Res.J. 753	15

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The States of California, Arizona, Florida, Oregon and Washington and the City of Long Beach respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this case on October 13, 1981 as modified on November 23, 1981.

OPINIONS BELOW

The Court of Appeals' opinion is reported at 658 F.2d 1355, with the modifications reported at ___

F.2d ___, and is included as Appendix A. The District Court's opinion is reported at 502 F.Supp. 1092 and is attached as Appendix B; its order is attached as Appendix C.

JURISDICTION

The Court of Appeals entered its opinion on October 13, 1981. Petitioners' timely petition for rehearing was denied on November 23, 1981, and this petition for certiorari was filed within ninety days of that date. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Consolidated for pretrial proceedings in the Central District of California under docket No. MDL-150 WPG are the suits that the States of California, Arizona, Oregon, Washington and Florida, and the City of Long Beach have brought against 16 major oil companies. The complaints, dating back between July 9, 1973 to August 5, 1977, allege antitrust violations and seek both damages and injunctive relief.

On February 29, 1980, Petitioners, the plaintiff states, noticed the deposition of a non-management employee who had retired from Respondent and defendant Atlantic Richfield

Company. Shortly after the notice was served the states' liaison counsel received a call from Atlantic Richfield's MDL-150 lawyer. During this call Atlantic Richfield's counsel informed plaintiffs that he was the deponent's personal attorney and that plaintiffs' communications to the witness should be directed to counsel. Plaintiffs were thereby precluded as a practical matter from interviewing the witness prior to his deposition.

On May 13, 1980, plaintiffs took the deposition of the former employee. Atlantic Richfield's MDL-150 counsel represented the deponent at the deposition, although counsel had never before acted as the deponent's personal lawyers. As an invididual non-party, the deponent faces no civil, let alone criminal, liability arising from the issues in these cases; yet counsel instructed the deponent not to answer questions concerning relevant matters and about his preparations for testifying, including the identities of documents defense counsel showed him to refresh his memory at the "orientation session."

On May 30, 1980, maintaining that counsel's dual representation of a defendant and non-party deponent in the same litigation deprived the states of their opportunity to interview deponents before the deposition and a fair opportunity to examine deponents during depositions, Petitioners moved the District Court for an order prohibiting such dual representation

and compelling the deponent to answer questions that Atlantic Richfield's counsel had instructed him not to answer. The District Court heard argument on the motion on August 27, 1980, and an Order and Memorandum of Decision were entered on November 12, 1980. In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation (C.D.Cal. 1980) 502 F.Supp. 1092.

The District Court decision was founded on an MDL-150 deposition record of defense counsel representing both a corporate defendant and a witness affiliated with their corporate defendant clients. The District Court's order disqualified defense counsel from simultaneously representing the corporate defendant and any employee (other than current corporate executives), or any former employee in their capacities as witnesses in the proceedings.

The District Court decision would have established guidelines for the MDL-150 litigation just as it was entering a period of intensive deposition discovery. By setting a definitive standard for what information concerning the lawyer-client relationship is discoverable, the District Court attempted to manage efficiently a large antitrust case involving numerous parties, hundreds of witnesses, and scores, if not hundreds, of lawyers.

The District Court specifically drew its order to preserve all privileges that a party may legitimately claim. "[N]othing in the order here rendered is

intended in any way to affect whatever privilege may otherwise exist between counsel for a company and an employee as to advice given or information exchanged with respect to current operations of the company." In re Petroleum Products, supra, 502 F.Supp. at 1099. The order "only precludes such counsel from now representing such a witness in preparing for and giving testimony in this litigation." 502 F.Supp at 1099.

The District Court avoided the practical quagmire of delineating the scope of the attorney-client privilege in the context of pending litigation by precluding an attorney-client relationship between corporate defense counsel and non-party witnesses. In so exercising its discretion to supervise the members of its bar, the District Court identified the issue before it as the tension between "unbiased testimony as opposed to defense partisanship." 502 F.Supp. at 1096.

The witness' independent duty to recall and to testify accurately and completely to the best of his recollection cannot always be merged with his defendant employer's interest in minimizing the extent of inculpatory evidence. When counsel instructs the non-party witness not to answer to protect the corporate client and not the witness, the purpose of the attorney-client privilege is subverted.

The District Court correctly concluded that in the situations before it, instructions not to answer unnecessarily and prejudicially impaired the ability to

discover facts. When a "privilege" that could be claimed solely because the witness is or has been affiliated with the corporation is invoked, if defense counsel "is also counsel for the witness and instructs him not to answer, a question necessarily arises as to which client's interests he is serving." 502 F.Supp. at 1098.

Respondents, the defendant oil companies, appealed the decision, and the court stayed its order.

The Court of Appeals for the Ninth Circuit determined that Upjohn Co. v. United States (1981) 449 U.S. 383, decided after the District Court entered its order, controls. Declining to address the District Court's analysis of the situation before it, the Court of Appeals said, "we are satisfied that the District Court would have ruled the other way if Upjohn had been decided before the District Court had to act." In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation (9th Cir. 1981) 658 F.2d 1355, 1361.

The Court of Appeals identified four elements of the District Court's decision. In the Court of Appeals' words, Factor No. 3, "Preparation for Deposition," is:

> "[I]f the attorney-client relationship with the witness did not exist, the plaintiffs could inquire into the records used to refresh the witness' memory and comments made to him by the

> company in orientation sessions. If an attorney-client relationship with the witness exists, however, the plaintiffs may not discover what occurred at the orientation session." 658 F.2d at 1359.

The Court of Appeals acknowledged the District Court's concern that:

> "because the witnesses are not parties, the interests of justice require that both sides be entitled to their testimony and be able to make full inquiry into the influences that may have affected the testimony." 658 F.2d at 1359.

Nevertheless, in the court's opinion, "Upjohn, undercuts factor No. 3, relied upon by the District Court," and "[w]ithout factor No. 3, the other factors[2/] are insufficient to support the disqualification order." 658 F.2d at 1361.

If upheld, the Court of Appeals' decision will prolong large antitrust cases, which are commonly regarded as protracted proceedings. The Ninth Circuit

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[2/]The other factors: whether non-party witnesses are able to determine their need for lawyers, let alone defense counsel; pre-deposition insulation of witnesses from plaintiffs' attempts to interview them; and defense counsel instructing non-party witnesses at the deposition not to answer. 658 F.2d at 1359.

has rejected the District Court's effort to expedite the MDL-150 cases by entering an order setting standards for counsel's dual representation for the entire litigation. Instead, the Court of Appeals suggested that witness-by-witness hearings on "potential abuses" of the attorney-client privilege coupled with "the judicious use of sanctions" to prevent corporate counsel from frustrating discovery. 658 F.2d at 1361. Upjohn does not prescribe this ad hoc approach to the problem of dual representation.

Thus, the decision presented for review here turns on the Court of Appeals' interpretation of Upjohn, supra, because it serves as the basis for the Court of Appeals' decision to extend beyond the "control group" the attorney-client privilege in all situations, and the other holding that Petitioners question: "The plaintiffs' attorneys may not discover what transpired in the 'orientation session' whether or not the defense attorneys act as counsel for the witness at the deposition." In re Petroleum Products, supra, 658 F.2d at 1361.

REASONS FOR GRANTING THE WRIT

The Court Below Decided Important Issues of the Federal Rules of Evidence in Ways Inconsistent With This Court's Relevant Decisions.

Petitioners will demonstrate that the Court of Appeals' construction of Upjohn extends the reach of

the attorney-client privilege beyond what is necessary to accomplish its purpose. The Upjohn setting of an internal corporate investigation involves considerations regarding the attorney-client relationship that are not applicable in the context of litigation, which is the situation of this appeal. Thus, the Court of Appeals may have misapprehended the Upjohn rule and applied it inconsistently with this Court's decision. New York City Transit Authority v. Beazer (1979) 440 U.S. 568, 570; Vermont Yankee Nuclear Corp. v. National Resources Defense Council (1978) 435 U.S. 519, 525; Wilkinson v. United States (1961) 365 U.S. 399, 401.

The Court of Appeals' decision appears to alter the attorney-client privilege as the courts and the bar have known it. Petitioners believe that this holding might be construed to shield from necessary scrutiny information relevant to a lawsuit that has never been privileged under existing precedent. Such a holding also poses the potential of needlessly and unfairly complicating judicial administration. If the Court of Appeals has departed from this Court's Upjohn interpretation of the attorney-client privilege in conflict with the principle that "the public has a right to every man's evidence," United States v. Bryan (1950) 339 U.S. 323, 331, such an extension of the privilege must be reviewed for its correctness. Trammel v. United States (1980) 445 U.S. 40, 47.

A. Upjohn Addressed a Situation Totally Different Than the One Before the Courts Below.

In Upjohn, the company's independent auditors discovered that a foreign subsidiary had paid foreign government officials to secure that government's business. Upon learning of these payments Upjohn's general counsel consulted with Upjohn's chairman, and it was decided that the chairman would send a letter to all foreign managers informing them that the general counsel would investigate the extent of Upjohn's foreign government payments. A questionnaire on such payments, to be returned to the general counsel in confidence, accompanied the chairman's letter. Upjohn, supra, 449 U.S. at 386.

Upjohn voluntarily submitted a report of its findings to the Securities and Exchange Commission and the Internal Revenue Service. In investigating the tax consequences of payments that Upjohn had disclosed, the IRS subpoenaed the questionnaires and Upjohn's notes of interviews with Upjohn managers and employees. Upjohn contested this portion of the IRS subpoena on the basis of the attorney-client privilege and the work product doctrine. Holding that the attorney-client privilege applies beyond the "control group" in the context of an internal corporate legal investigation, the Court reversed the Sixth Circuit's enforcement of the subpoena.

The Court clearly did not intend its Upjohn decision to be extended to other situations in which the attorney-client privilege would be at issue: "We decline to lay down a broad rule or series of rules to govern all conceivable future questions in this case, even were we able to do so." 449 U.S. at 386. "Needless to say, we decide only the case before us, and do not undertake to draft a set of rules which should govern challenges to investigatory subpoenas." 449 U.S. at 396 (emphasis added).

The Court of Appeals' apparent extension of the Upjohn rule on internal corporate investigations to the situation of an "orientation session" between defense counsel and non-control group employees in preparation for deposition testimony, In re Petroleum Products, supra, 658 F.2d at 1361 n. 7, suggests that the attorney-client privilege is now unqualified to the point where corporate counsel has a procedural sword to frustrate the discovery process. As we show below, there are persuasive reasons why the attorney-client privilege cannot be as broad as the lower court's decision appears to be making it.

B. Upjohn Does Not Extend the Attorney-Client Privilege Beyond the "Control Group" in the Context of Pending Litigation.

In Upjohn, this Court decided that the "control group test" for purposes of the attorney-client

privilege does not serve the privilege in the setting of a self-initiated corporate internal investigation. Upjohn, supra, 449 U.S. at 394. The Court found that:

> "Information, not available from upper-echelon management, was needed to supply a basis for legal advice concerning compliance with securities and tax laws, foreign laws, currency regulations, duties to shareholders, and potential litigation in each of these areas." 449 U.S. at 394.

Upjohn employees outside the "control group" of those who "personify the corporation," possessed information that Upjohn's general counsel sought. The Court reasoned that since

> "the Government was free to question the employees who communicated with [general counsel] Thomas and outside counsel," "[a]pplication of the attorney-client privilege to communications such as those involved here, however, puts the adversary in no worse position than if the communications had never taken place." 449 U.S. at 396 and 395.

Consequently, the Court determined that the attorney-client privilege's "'zone of silence' over corporate affairs," when applied to non-control group personnel in this specific context would not compromise

the Government's ability to investigate Upjohn's conduct.

Although the Chief Justice advocated articulating a standard to govern similar cases, 449 U.S. at 402, the majority declined "to draft a set of rules which should govern challenges to investigatory subpoenas." 449 U.S. at 396. In seeming disregard of the Court's careful limitation of Upjohn to its facts, the Court of Appeals now extends Upjohn's narrow rejection of the control group test to the situation where corporate counsel conducts an "orientation session" to prepare a corporate employee or former employee to testify in pending litigation. Petitioners submit that the Court of Appeals misinterpreted Upjohn and created a zone of silence so broad that the attorney-client privilege now shields everything said between all corporate employees and former employees and corporate counsel, irrespective of factual setting. See, Part C, infra.

Because the attorney-client privilege allows relevant information to be withheld from the factfinder, its operation threatens possible abuse of the discovery process through inappropriate claims of privilege. Where the discovery process is abused, litigation is often delayed and justice denied. Federal Rules of Civil Procedure, Rule 1; ACF Industries, Inc. v. Equal Employment Opportunity Commission (1979) 439 U.S. 1081, 1086 (Powell, J., dissenting). Thus, to serve the speedy search for the truth, the application of any

privilege must be balanced with efficient judicial administration.

While the Court of Appeals was concerned about preserving an important evidentiary privilege, it may not have been totally cognizant of the need to apply efficiently the privilege in the context of a large case. Large cases raise their own brand of discovery problems that cause judicial inefficiency including "overinclusive assertions of privilege." Brazil, Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery, 1980 Am.Bar.F.Res.J. 217, 230 n. 23. In fact, a significant percentage of lawyers would say that the attorney-client privilege is an impediment to discovery in large cases. Brazil, Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses, 1980 Am.Bar.F.Res.J. 789, 833.

The attorney-client privilege becomes a consideration in deciding whether the same counsel may represent a corporation along with a non-control group corporate employee in the same proceeding. Thus, in applying the privilege the court might reasonably determine that:

> "In fact, the function of attorney-client privilege in this context is to completely identify the attorney with the interests and goals of the corporate actor. That, in turn, is to eventually alienate the corporate

> counsel from any self-identification as a member of an autonomous profession pursuing a social goal [fair and efficient discovery of the truth] above and beyond that of the immediate client." Slovak, The Ethics of Corporate Lawyers: A Sociological Approach, 1981 Am.Bar.F.Res.J. 753, 778.

See, Kennedy, Special Problems in Representing the Individual Defendant, 47 Antitrust L.J. 667, 669 (1978); Address by Richard J. Favretto, Deputy Director of Operations, Antitrust Division, before the Chicago Bar Association Antitrust Symposium, Chicago, Illinois (1977); Sims, Criminal and Civil Antitrust Litigation: A Prosecutor's Perspective, 46 Antitrust L.J. 690, 694 (1977).

The District Court's order was part of the court's attempt to manage a large multidistrict case (28 U.S.C. § 1407) by removing unnecessary impediments to discovery while preserving all parties' rights. In re Petroleum Products, supra, 502 F.Supp. at 1099. The courts agree that the trial judge must have "full control of a case from the time of filing." Ridge, The Organization of a Big Case - The First Pre-Trial Conference, 21 F.R.D. 406. As the trial bar also recognizes, "Firm judicial control of complex cases is essential to avoid the serious problems of unnecessary delay, unmanageable discovery and unwarranted

expense." Recommendations of the American College of Trial Lawyers on Major Issues Affecting Complex Litigation, 90 F.R.D. 207, 211.

In the context of the large MDL-150 litigation here, the control group test preserves the proper balance between efficient discovery procedures and the policy of the attorney-client privilege. While the privilege always applies between corporate counsel and the control group, it should not apply across the board to all employees in the context of litigation where it could delay a large case.

The control group test does not modify either the policy or substance of the privilege; it simply defines who is the "client" for purposes of applying the privilege to corporations. Harper & Row Publishers, Inc. v. Decker (7th Cir. 1970) 423 F.2d 487, 491, affd. 400 U.S. 348; In re Ampicillin Antitrust Litigation, MDL-50 (D.D.C. 1978) 81 F.R.D. 377, 384.

Accordingly, the Court should review the Court of Appeals' extension of Upjohn to circumstances that were not present in Upjohn.

C. The Court of Appeals' Decision Extends the Attorney-Client Privilege to Frustrate the Discovery Process.

In extending Upjohn as it did, the Court of Appeals lost sight of the fundamental policy that privileges against disclosure are not to be construed lightly or expansively, "for they are in derogation of the

search for truth." United States v. Nixon (1974) 418 U.S. 683, 710. Evidentiary privileges must serve the search for the truth and the administration of justice:

> "[S]ince the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose. Accordingly it protects only those disclosures — necessary to obtain informed legal advice — which might not have been made absent the privilege." Fisher v. United States (1976) 425 U.S. 391, 403 (emphasis added).

The Court of Appeals did not confront the difference between "the substance of the client's communication as well as the attorney's advice in response thereto"[3/] on one hand, and relevant facts or documents that the witness knows from sources outside his own recollection, on the other. The Court of Appeals' decision seems to overlook the distinction that when corporate counsel tell the witness facts or show him documents in preparing the witness to testify, no privileged communication occurs. Accordingly, the Court of Appeals' cavalier assertion that everything that "transpired in the 'orientation session' whether or

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3/ Matter of Fischel (9th Cir. 1977) 557 F.2d 209, 211.

not the defense attorneys act as counsel for the witness at the deposition," 658 F.2d at 1359, is immune from discovery necessarily frustrates the search for the truth.

This conclusion derives from the Court's classic analysis that: "The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney." Upjohn, supra, 449 U.S. at 395 (emphasis added). "[A] party cannot conceal a fact merely by revealing it to his lawyer." 449 U.S. at 382.

Similarly, documents that an attorney receives in the course of consulting with a client are not privileged. Falsome v. United States (5th Cir. 1953) 205 F.2d 734, 739, cert. den., 346 U.S. 864. "Furthermore, no privilege will attach to those documents directed to the attorney for the purpose of shielding the documents from disclosure." Burlington Industries v. Exxon Corporation (D.Md. 1974) 65 F.R.D. 26, 39. Indeed, "the attorney-client privilege does not extend to communications between attorney and client where the purpose of that communication is to further the crime charged in the indictment or future intended illegality." United States v. Friedman (9th Cir. 1971) 445 F.2d 1076, 1086; see, Clark v. State (Ct.Crim.App. Tex. 1953) 261 S.W.2d 339, 341, 347.

The attorney-client privilege protects communications in which clients tell their lawyers facts; after all, the privilege was devised to promote

the securing of legal advice. Fisher v. United States, supra. But, there is no authority for banning inquiry into what facts the lawyer told the client. The reason is clear — the lawyer's role is to give legal advice, not to create factual testimony.

The District Court's order attempted to strike a balance between the policy of the attorney-client privilege and the promotion of truthful testimony — the conflict between "unbiased testimony as opposed to defense partisanship." In re Petroleum Products (C.D.Cal. 1980) 502 F.Supp. 1092, 1096. If the balance cannot be struck by disqualifying corporate counsel from also representing non-control group employees, then it should not be totally destroyed by an absolute shield against inquiry into the "orientation session."

In civil antitrust cases virtually the only competent witnesses are defendants' own employees or former employees. To test these witnesses' credibility and to assist the trier of fact, plaintiffs must be permitted to inquire about factors that could suggest bias. United States v. International Business Machines (S.D.N.Y. 1979) 84 F.R.D. 651.

When a non-control group employee undergoes an "orientation session," counsel's recital of facts may influence the employee's testimony. Consequently, it is reasonable to ask questions about the source of the witness' knowledge — whether his knowledge of the facts to which he testifies comes

from defense counsel or his own recollection of past events.

The Court of Appeals' decision could be interpreted to preclude a party from discovering facts that corporate counsel told the witness. It might prohibit such questions as: "Did you speak to defense counsel in preparing to testify today?" "How long did this interview last?" "Did counsel tell you facts to refresh your memory?" "What facts did counsel tell you?" Not one of these questions invades the attorney-client privilege by asking about "the substance of the client's communication as well as the attorney's advice in response thereto." Matter of Fischel, supra.

This line of questioning seeks the facts of the witness' preparation to testify and the facts brought up during the "orientation session." Such facts are not among the communications that the attorney-client privilege protects, yet the Court of Appeals' decision apparently forecloses Petitioners from inquiring about them. Petitioners submit that Upjohn does not permit such a result and urge that the Court review the decision below.

CONCLUSION

Upjohn was decided in the context of, and limited to, specific circumstances. The Upjohn situation is not present in this case. Accordingly, the Court's rejection of the control group test where

self-initiated internal corporate investigations are involved does not necessarily extend to corporate counsel's orientation session with a prospective witness in pending litigation as the Court of Appeals suggests.

Upjohn also does not so alter the attorney-client privilege to prevent discovery of facts that lawyers tell witnesses or documents that lawyers show witnesses at the "orientation session." If Upjohn undercuts factor No. 3, pre-deposition preparation, and disables the basis for the District Court's order, then the attorney-client privilege now protects corporate counsel's recital of facts to all employees, and Petitioners and the trier of fact will be unable to discern any corporate witness' bias and credibility.

If the courts and the bar are "to safeguard the integrity of the judicial process," particularly "in the eyes of the public," "it is desirable that an attorney be aware of what actions will not be countenanced." In re Petroleum Products, supra, 658 F.2d at 1360. The attorney-client privilege was not conceived to disadvantage litigants by precluding inquiries into the non-privileged factual aspects of corporate counsel's "orientation sessions" with employees who are prospective witnesses. The search for the truth should not be subordinated to the "mere inconvenience and frustration" (658 F.2d at 1361) that the Court of Appeals thinks is a necessary effect of its unprecedented extension of the attorney-client privilege.

The Court of Appeals' decision does not balance the policy of the privilege against the public's right to the truth. In contrast, the District Court's order would preserve the privilege in conformance with Upjohn, and simultaneously serve the search for the truth. Therefore, it should be reinstated.

The Court should issue a writ of certiorari to review the judgment and opinion of the Court of Appeals.

Respectfully submitted this 18th day of December, 1981.

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APPENDIX A

Nos. 80-5970 to 80-6028, 80-7669,
80-7756, 81-7013 and 81-7029

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCT ANTITRUST LITIGATION --- The City of Long Beach, as Trustee for the State of California; State of California, on behalf of itself and all political subdivisions and special districts within the state similarly situated; State of Florida, et rel. Jim Smith, Attorney General; State of Oregon, on behalf of itself, its residents and all political subdivisions within the state similarly situated; State of Washington, on behalf of itself and its public entities and residents; and State of Arizona, Plaintiffs-Appellees, v. STANDARD OIL COMPANY CF CALIFORNIA; Amerada Hess Corporation; Cities Services Company and Cities Service Oil Company; Conoco, Inc.; Getty Oil Company; Gulf Oil	APPEAL from the United States District Court for the Central District of California

Corporation; Powerline Oil Company; Standard Oil Company of Indiana and Ohio; Sun Oil Company, Inc.; Atlantic Richfield Company; Mobil Oil Corporation; Phillips Petroleum Company; Exxon Corporation; Shell Oil Company; Texaco, Inc.; and Union Oil Company of California,

Defendants-Appellants,

and

Leroy K. Cheney; Charles F. Temme; Milford E. Tracy; Clinton E. Kelley; L. John Gandsey; and Ralf Eckles,

Third Party Deponents-Appellants.

MOBIL OIL CORPORATION; Exxon Corporation; Leroy K. Cheney; Ralf Eckles; L. John Gandsey; Clinton E. Kelley; Charles F. Temme; Milford E. Tracy; Union Oil Company of California; Howard K. Said; and Brobeck, Phleger and Harrison,

Petitioners,

The UNITED STATES DISTRICT COURT FOR the CENTRAL DISTRICT OF CALIFORNIA,

Respondent,

State of California; et al.,)
)
)
Real Parties In)
)
Interest.)

Argued and Submitted July 6, 1981.

Decided October 13, 1981.

Before GOODWIN AND NELSON, Circuit Judges, and PRICE,* District Judge.

GOODWIN, Circuit Judge.

The district court, on the motion of the plaintiffs, entered an order disqualifying defense counsel from representing former employees of the defendants and their present employees (other than corporate executives) in connection with discovery depositions in several consolidated multi-district antitrust cases. The defendant corporations and the employee witnesses appeal. We find that we have jurisdiction of this appeal and vacate the order of disqualification. 502 F.Supp. 1092.

I. JURISDICTION.

[1] The proliferation of interlocutory

*The Honorable Edward Dean Price, United States District Judge for the Eastern District of California, sitting by designation.

appeals seeking review of orders entered at various stages of litigation has produced sometimes conflicting decisions among the circuits on the jurisdictional basis for appellate review. Denial of a motion to disqualify counsel is not an appealable order under the test set forth in Cohen v. Beneficial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). Firestone Tire & Rubber Co. v. Risjord, 449 U.S. ____, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981). Firestone reserved the question of the appealability of orders granting a motion to disqualify counsel. 449 U.S. at ____, n. 8, 101 S.Ct. at 672, n. 8.

The position of this circuit on the pending question is not clear. Even prior to Firestone, the Ninth Circuit did not hear appeals from denials of motions to disqualify. See Chugach Elec. Ass'n v. United States D.C. For Dist. of Alaska, 370 F.2d 441 (9th Cir. 1966), cert. denied, 389 U.S. 820, 88 S.Ct. 40, 19 L.Ed.2d 71 (1967). But this court has reviewed at least one order granting disqualification without discussing whether it was taking jurisdiction under the Cohen exception to 28 U.S.C. § 1291 or via mandamus. See Gas-A-Tron of Arizona v. Union Oil Co. of California, 534 F.2d 1322 (9th Cir.), cert. denied, 429 U.S. 861, 97 S.Ct. 164, 50 L.Ed.2d 139 (1976). Since Firestone the Fifth Circuit has held a disqualification order appealable under Cohen and Firestone. Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 646 F.2d 1020 (5th Cir. 1981).

We agree that this order granting disqualification is appealable under Cohen's three-part test. Firestone summarized the Cohen test as follows:

> ". . . '[T]he order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.' [citation omitted]." 449 U.S. at ____, 101 S.Ct. at 674.

Under the first prong, we note that the Firestone Court, with two justices dissenting, found that even "[a]n order denying a disqualification motion meets the first part of the 'collateral order' test. It 'conclusively determine[s] the disputed question,' because the only issue is whether challenged counsel will be permitted to continue his representation. . . ."
449 U.S. at ____, 101 S.Ct. at 674 (emphasis added). This consideration becomes stronger in cases where a disqualification motion has been granted, because once those affected by the order have acted on it — bringing in new counsel, for instance — the effect of the order is fairly irreversible.[1] It is not, as a practical matter,

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[1]The significant differences between the two types of orders were summarized by the District of Columbia Circuit, as follows:

> "'[The finality of the two orders is as dissimilar as their results. An order granting disqualification

(Footnote cont. on next page.)

"subject to reconsideration from time to time," Cohen, supra, 337 U.S. at 546-47, 69 S.Ct. at 1226, because once a person's chosen attorney has been barred from representing that person, the person must then and there materially change his or her position in retaining another attorney or choosing to forego representation. Cf. Firestone, 449 U.S. at ____, 101 S.Ct. at 677 (Rehnquist, J., concurring in result only) (denial of disqualification motion does not conclusively determine disputed question where court may reconsider issue as trial progresses). The effect here is immediate and conclusive.

Second, the grant of a motion to disqualify counsel serves to "resolve an important issue completely separate from the merits of the action," Firestone, supra, 449 U.S. at ____, 101 S.Ct. at 674. It is not merely a step toward a final judgment into which it will merge. Cohen, supra, 337 U.S. at 546, 69 S.Ct. at

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(Footnote 1 cont. from previous page.)

> seriously disrupts the progress of the litigation and decisively sullies the reputation of the affected attorney; but one refusing such relief merely allows the action to proceed and has no permanent effect of any kind. Here, as with a motion to dismiss an action or to grant summary judgment, while the affirmative grant of the requested relief is final and appealable, a mere refusal to act is necessarily less conclusive and ought not to be reviewed by this court. * * *' Fleischer v. Phillips, 264 F.2d 515, 517 (2d Cir.), cert. denied, 359 U.S. 1002, 79 S.Ct. 1139, 3 L.Ed.2d 1030 (1959)." Community Broadcasting of Boston, Inc. v. F.C.C., 546 F.2d 1022, 1025, n. 13 (D.C. Cir. 1976).

1225. The question whether counsel should be disqualified is a legal issue distinct and separate from the underlying antitrust issues involved in this case. It is not so enmeshed in the factual and legal issues comprising the plaintiff's cause of action, nor of such a nature as to permit fair assessment only after trial, as to militate against review at this time. Rather, given the magnitude of these consolidated pretrial proceedings, the number of attorneys already involved, and the seriousness of the question presented, we feel that this claim falls into the "small class [of cases] . . . too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Cohen, supra, 337 U.S. at 546, 69 S.Ct. at 1225, 1226.

Third, if this court withholds review at this time, the order of disqualification will be unreviewable on appeal from final judgment. The rights involved will be lost irreparably in a manner where, unlike the situation in Firestone, see 449 U.S. at ____, 101 S.Ct. at 675, remedy of a new trial after appeal from final judgment would not adequately redress any injury. See Duncan, supra, 646 F.2d at 1027. Furthermore, litigants facing a disqualification order do not have available to them the protection cited by the Firestone Court as a rationale for denying review of most pretrial discovery orders: "[I]n the rare case when appeal after final judgment will not cure an erroneous discovery order, a

party may defy the order, permit a contempt citation to be entered against him, and challenge the order on direct appeal of the contempt ruling." 449 U.S. at ____, 101 S.Ct. at 675. An attorney choosing to defy a disqualification order faces not only contempt sanctions but direct disciplinary action for an ethical violation. This differs markedly from the case where an attorney in good faith takes the position that his client should not be required to comply with a discovery order; at least in that instance, the lawyer is not required to engage in what amounts to an act of civil disobedience with personal consequences in order to obtain review.

In light of the above considerations, we conclude that we have jurisdiction to review this order under 28 U.S.C. § 1291 as a Cohen collateral order.[2]

II. THE STANDARD OF REVIEW.

[2] This court has stated that the district court has the prime responsibility for controlling the conduct of lawyers practicing before it, and that an order disqualifying counsel will not be disturbed if the record reveals "any sound" basis for the district court's action. Gas-A-Tron of Arizona v. Union Oil Co. of California, supra, 534 F.2d at 1325 (9th Cir. 1976); see Unified Sewerage Agency, Etc. v. Jelco Inc., 646 F.2d

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[2]The parties also petitioned for a writ of mandamus. Because we hold that we have jurisdiction to hear the appeal, we need not consider the mandamus petitions.

1339 (9th Cir. 1981).[3] Thus, where the matter is discretionary, we will not reverse the district court unless it abuses its discretion. Trone v. Smith, 621 F.2d 994, 999 (9th Cir. 1980). We may reverse, however, where the district court misperceives the law or does not consider relevant factors and thereby misapplies the law.

III. THE MERITS.

A. The District Court Decision.

The district court discussed two possible justifications for the disqualification order. In its accompanying memorandum of decision, the court first considered whether Canon 5 of the ABA Code of Professional Responsibility requires disqualification. The district court did not apply the local rule,[4] but

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[3]But see, Aetna Cas. & Sur. Co. v. United States, 570 F.2d 1197 (4th Cir.), cert. denied, 439 U.S. 821, 99 S.Ct. 87, 58 L.Ed.2d 113 (1978); Woods v. Covington Cty. Bank, 537 F.2d 804 (5th Cir. 1976) (holding that where the facts are not in dispute, district courts enjoy no particular functional advantage over appellate courts in their formulation and application of ethical norms and that it is proper for the appellate court to determine whether the district court's disqualification order was predicated upon a proper understanding of applicable ethical principles.

[4]Local Rule 1.3(d) of the Central District of California states:

"Every member of the bar of this Court and any attorney permitted to practice in this Court under paragraph (b) hereof shall familiarize himself with and comply with the standards of professional

(Footnote cont. on next page.)

applied only Canon 5 and accompanying Disciplinary Rule 5-105 in reaching its conclusion that the multiple representation at issue here did not give rise to a prohibited conflict of interest. See generally, Unified Sewerage Agency, Etc. v. Jelco Inc., supra, 646 F.2d 1339, (application of Canon 5 to disqualification motions in Oregon district court).

Because the local rule refers to both, a possible difficulty arises because of the difference between the ABA Code and the analogous provision of the Rules of Professional Conduct of the State Bar of California. California Rule 5-102(B) sets what appears to be a different standard, in stating that "[a] member of the State Bar shall not represent conflicting interests, except with the consent of all parties concerned."

(Footnote 4 cont. from previous page.)
conduct required of members of the State Bar of California and contained in the State Bar Act, the Rules of Professional Conduct of the State Bar of California, and decisions of any court applicable thereto, which are hereby adopted as standards of professional conduct of this Court. This specification shall not be interpreted to be exhaustive of the standards of professional conduct. In that connection, the Code of Professional Responsibility of the American Bar Association should be noted. No attorney admitted to practice before this Court shall engage in any conduct which degrades or impugns the integrity of the Court or in any matter [sic] interferes with the administration of justice therein."

We need not attempt to resolve the possible inconsistency between the State Bar rules and the ABA Code, however. Our independent review of the ethical questions presented here persuades us that neither provision would operate to disqualify counsel in the instant case. Whether disqualification would be appropriate where one rule permitted multiple representation and another did not, we need not address at this time.

The district court next considered whether Canon 9 of the ABA Code requires disqualification. The court concluded that Canon 9[5] required disqualification in order to avoid the appearance of impropriety.

The court discussed four "troublesome ethical considerations" which arose in this case:

1) The Determination of the Need for Counsel: the court was concerned about the suggestion of explicit or implicit solicitation. The court noted that when the employees informed the company of the deposition notice, they might not have been looking for counsel of their own, or have thought they needed it. The court referred to Informal Ethics Opinion No. 828

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[5]Although no direct counterpart to Canon 9 appears in the Rules of Professional Conduct of the State Bar of California, we will assume arguendo that the reference to the ABA Code in Local Rule 1.3(d) sufficiently invokes Canon 9 as to make it a basis for an order such as the one under review. See discussion above.

(1965) which said that the attorney for the plaintiff company may not offer to represent during their deposition independent witnesses deposed by the defense.

2) Pre-Deposition Insulation: the court indicated that if an attorney-client relationship is established, the plaintiffs' attorneys will not be able to contact the witness directly to ascertain his knowledge or decide whether to depose him. The court noted that the representation limits the opposing counsel's ability informally to ascertain the scope of the witness' knowledge and the desirability of deposing him. It indicated that even though a witness need not consent to an interview, the representation effectively insulates the witness from plaintiffs' counsel and gives that counsel no realistic chance to obtain the witness' consent to talk freely.

3) Preparation for Deposition: the court noted that if the attorney-client relationship with the witness did not exist, the plaintiffs could inquire into the records used to refresh the witness' memory and comments made to him by the company in orientation sessions. If an attorney-client relationship with the witness exists, however, the plaintiffs may not discover what occurred at the orientation session. The court noted that because the witnesses are not parties, the interests of justice require that both sides be entitled to their testimony and be able to make full inquiry into the influences that may have affected the testimony.

4) Instruction Not to Answer: the court stated that the witness' attorney might be tempted to object at the deposition and interrupt the plaintiff-interrogator not so much from a desire to protect the witness, as from a desire to serve the employer's interests. The court noted that it is unfair to an interrogator for his opponent to have such control over a nonparty witness. The court felt abuses might occur which would not merit sanctions.

The court acknowledged that its decision went beyond established precedent. The court referred to various authority, however, which involved disqualification motions based on Canon 9's appearance of impropriety test. The court noted that serious antitrust violations of national concern are charged in the lawsuit and that the public interest will be favored by employee disclosures that might be withheld if counsel were present. The court also relied on the Second Circuit's assertion that in the disqualification situation, doubts are to be resolved in favor of disqualification. Hull v. Celanese Corp., 513 F.2d 568, 571 (2nd Cir. 1975).

B. The Appellants' Positions.

The appellants first argue that the court erred in relying solely on Canon 9 to disqualify the law firms. They next argue that the district court should not have ruled on the basis of mere speculation. They contend that factual findings should have been made. The appellants also argue that the court improperly

weighed the four factors to arrive at its conclusion of impropriety. They respond to the court's four points in the following manner:

1) Insulation of Witnesses: the appellants respond that the court cited no authority which suggests that insulation of witnesses is a proper factor for the court to consider in disqualification motions. They refer the court to United States v. Linton, 502 F.Supp. 871 (D.Nev. 1980), which denied a disqualification order in an analogous case.

2) Pre-Deposition Insulation: appellants have argued that the plaintiffs do not have an absolute right to interview witnesses because the witnesses may always refuse consent.

3) Preparation for Deposition: the appellants argue that even without the disqualification order, the plaintiffs would not be able to question the witnesses regarding their exchanges with the employers' counsel. They argue that this communication is protected by Upjohn Co. v. United States, 449 U.S. ___, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). They also refer to Fed.R.Evid. 612, which they say allows the district court to require production of any writing used to refresh a witness' memory. (They note that this is true even though the writings might have been protected by the attorney-client relationship.)

4) Instruction Not to Answer: the appellants argue that the district court need not have

resorted to disqualification because other sanctions were available. Some appellants also argue that the attorney is not serving two masters, but appears at the deposition only on behalf of the employer.

C. The Scope of Canon 9.

[3] Thus, the first issue the court must decide is whether Canon 9 alone can be the basis for a disqualification motion. Strong policy reasons support an affirmative answer. The court is instructed to safeguard the integrity of the judicial process in the eyes of the public. See Jelco, supra, 646 F.2d at 1349. Where the lawsuit in question involves the state suing on behalf of its citizens, rather than litigation between two private parties over a private problem, this interest must be particularly strong. Moreover, Local Rule 1.3(d) of the Central District of California provides that:

> ". . . No attorney admitted to practice before this Court shall engage in any conduct which degrades or impugns the integrity of the Court or . . . interferes with the administration of justice therein."

In addition, Local Rule 1.3(d) refers attorneys appearing before the District Court of the Central District of California to the Code of Professional Responsibility as well as the California State Bar Act. If Canon 9 were not separately enforceable, it would be stripped of its

meaning and significance. This suggests that it must be a sufficient ground for disqualification in itself.[6]

On the other hand, it is desirable that an attorney or client be aware of what actions will not be countenanced. Advance notice is essential to the rule of law. The need for standards and guidelines for attorney conduct was eloquently articulated in Woods v. Covington Cty. Bank, 537 F.2d 804 (5th Cir. 1976).

After carefully reviewing the policy considerations on both sides, we hold that Canon 9 alone can be the basis for a disqualification motion. In order that the court may in fact control the conduct of attorneys appearing before it, the court should have the ability to disqualify attorneys if their conduct actually interferes with the integrity of the court, or actually produces an appearance of impropriety. However, an order of disqualification by the district court that is not based on articulable principles cannot be sustained. This court will affirm such an order only where the impropriety is clear and is one that would be recognized

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[6]The reporter for the ABA Committee that drafted the Code of Professional Responsibility recently noted that the Code's Disciplinary Rules were drafted for use in disciplinary proceedings and were not intended to be used as rules governing disqualification motions. Sutton, How Vulnerable is the Code of Professional Responsibility?, 57 N.C.L.Rev. 497, 514-16 (1979). Nevertheless, the Code will continue to provide guidance to the courts in determining whether a case would be tainted by the participation of an attorney or firm as shown by the Central District of California's Local Rule 1.3(d).

as such by all reasonable persons. See, e.g., Gas-A-Tron, supra, 534 F.2d at 1325; Woods v. Covington Cty. Bank, supra, 537 F.2d at 813 (the Canon 9 standards are not those imputed only to the most cynical members of the public.) The impropriety must affect the public's view of the judicial system or the integrity of the court.

D. The Finding of Impropriety.

[4] Appellants are correct in asserting that the plaintiffs supplied no authority for the court to conclude that the four factors discussed earlier created ethical problems and infringed upon the integrity of the court. This, however, is not controlling. If the situation does endanger the integrity of the court, it is immaterial that the same circumstances have never been considered before. The crucial question is whether the concerns expressed are indeed present or merely anticipatory and speculative. In other words, did the court have a basis for finding apparent improprieties that were serious enough to outweigh the parties' interests in being represented by counsel of their choice?

In light of Upjohn Co. v. United states, 449 U.S. ____, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981), which was decided after the district court entered its order, we are satisfied that the district court would have ruled the other way if Upjohn had been decided before the district court had to act.

Upjohn undercuts factor No. 3, relied upon by the district court. The plaintiffs' attorneys may not discover what transpired in the "orientation session" whether or not the defense attorneys act as counsel for the witnesses at the deposition.[7] Without factor No. 3, the other factors are insufficient to support the disqualification order. Factor No. 1 — the solicitation factor — is a problem more properly addressed to the organized bar than to the court. The "solicitation" alleged, even if it could be substantiated, does not cut to the heart of the integrity of the system so as to require the court to take drastic steps to safeguard the

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[7]Upjohn reversed the Third Circuit's "control group" test for the scope of the attorney-client privilege in the corporate context. It held that information concerning potential violations transmitted by Upjohn's current employees to corporate counsel was privileged.

Although Upjohn was specifically limited to current employees, 101 S.Ct. at 685, n. 3, the same rationale applies to the ex-employees (and current employees) involved in this case. Former employees, as well as current employees, may possess the relevant information needed by corporate counsel to advise the client with respect to actual or potential difficulties. See id., at 683. Again, the attorney-client privilege is served by the certainty that conversations between the attorney and client will remain privileged after the employee leaves. Although no findings were made, it is clear that at least some of the conversations referred to by the district court were made to counsel for the companies in order to secure legal advice for the company. The orientation sessions undoubtedly provided information which will be used by corporate counsel in advising the companies how to handle the pending lawsuit.

image of the judicial process in the eyes of the public. Moreover, we note that in light of Upjohn, the definition of solicitation in the corporate-counsel context is altered. Factor No. 2 — the pre-deposition insulation — is an inconvenience, admittedly, and a frustration. But mere inconvenience and frustration do not warrant interference with the right to counsel.

Nor can factor No. 4 — the instructions not to answer — suport the order. Assuming, without deciding, that the attorney represents two different clients, the employee and the company, this problem can be dealt with by the judicious use of sanctions. The trial judge in this particular case is obviously sensitive to potential abuses. He may instruct the attorneys on how to conduct the depositions; for example, that they may interrupt the proceedings only on behalf of their witness-clients. They may be called upon to explain why an interruption was made. Costs can be assessed against counsel for vexatious delays. In addition to the sanction of costs, the court, after a warning, has contempt power. Finally, the court could always suggest to the plaintiffs that they renew their motion to disqualify should specific behavior problems occur.

IV. CONCLUSION.

1) We have jurisdiction to review the order granting disqualification in this case under the Cohen collateral order doctrine. 2) While Canon 9 can be the sole basis for a disqualification order, in this

case the disqualification order was not supported by Canon 9. 3) Upjohn, which was decided after the district judge entered his order, protects the information under factor No. 3 which the district judge thought would have been accessible under his order. Without that factor, insufficient reason exists to disqualify the attorneys. Accordingly, the order disqualifying counsel is vacated.

Vacated and remanded.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION	
THE CITY OF LONG BEACH, as Trustee for the State of California, et al., Plaintiffs-Appellees, vs. STANDARD OIL COMPANY OF CALIFORNIA, et al., Defendants, and ATLANTIC RICHFIELD COMPANY, Defendant-Appellant.	Nos. 80-5970 thru 80-6028 80-7669 80-7756 81-7013 81-7029 ORDER

Before: GOODWIN and NELSON, Circuit Judges, and PRICE,* District Judge

The opinion entered herein on October 13, 1981, is amended as follows:

On slip opinion page 5158, column 2, before the paragraph beginning "In light of . . ." insert:

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*The Honorable Edward Dean Price, United States District Judge for the Eastern District of California, sitting by designation.

This court has held that an order disqualifying defense counsel in a criminal case is not appealable under the collateral order exception to the final judgment rule. United States v. Greger, 657 F.2d 1109, 1112 (9th Cir. 1981). That holding, however, was specifically limited to the context of a criminal case, and reserved the question presented here. Id. at 1113.

Distinct reasons for a different result apply in this civil case. The special policies which counsel against piecemeal appeals in criminal cases have no counterpart here. Cf. Greger, supra, at 1112. An appeal of a disqualification order in a civil case does not necessarily disrupt the litigation because activity must be postponed in any case while new counsel is obtained. Furthermore, in a civil case an order disqualifying attorneys for nonparties is effectively unreviewable by appeal from a final judgment. Finally in a civil case, the presumption of prejudice which would mandate a new trial if error were established under the criminal law does not exist. Cf. Greger, supra, at 1113; Slappy v. Morris, 649 F.2d 718 at 723 n. 4 (9th Cir. 1981).

It would place an almost insurmountable burden on a person who is not a party to the litigation to vindicate a right to counsel of his choice. Even a party would face serious difficulties if he were required to show on appeal from the final judgment that he had lost the case because he had been improperly forced to change counsel. Duncan v. Merrill Lynch, Pierce, Fenner & Smith, 646, F.2d 1020, 1027 (5th Cir. 1981).

The petition for rehearing is denied.

APPENDIX B

In re COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION

M.D.L. No. 150 WPG

United States District Court
C. D. California

Nov. 10, 1980

MEMORANDUM OF DECISION

WILLIAM P. GRAY, District Judge

In these cases, which charge major oil companies with having conspired to violate the antitrust laws of the United States, the plaintiffs (Attorneys General of several states) currently are in process of noticing the depositions of employees and retired employees of the defendant corporations. It often happens that when such a prospective deponent receives a subpoena for his deposition, or otherwise learns that he is a target of inquiry, he, understandably, contacts an appropriate representative of his employer (or former employer) and inquires as to what the dispute is all about and where he fits into the picture. He promptly is referred to the firm of attorneys that are representing the company in these actions and, from the first interview, it is mutually and tacitly inferred that an attorney-client relationship has been established, at no cost to him, which carries through the preparation for the deposition and its accomplishment.

The plaintiffs contend that they are prejudiced by such a process and have moved that counsel in these actions be precluded from simultaneously representing a party and an individual non-party deponent. This court agrees with the plaintiffs, for reasons herein set forth, and will issue an order accordingly.

[1] The employees and former employees that the plaintiffs seek to depose are not defendants, nor are they, through any stretch of imagination, likely to become defendants. They presumably are independent witnesses whose duty and only appropriate objective is to tell "the truth, the whole truth, and nothing but the truth." Such goals, as defense counsel point out, are basically in harmony with their own, as respected members of the profession and officers of the court. "Basically," but not quite. Unlike the independent witnesses, counsel are not supposed to be disinterested. Their duty is to cause the record of a deposition or of a trial to be just as favorable to their clients as they can. I do not mean to imply that the interests of the witness and of the attorney are likely to be out of harmony with each other or that counsel would be willing to suborn perjury. However, "the whole truth" often becomes a matter of subjective judgment, and a factual conclusion that is deeply held by a party and its counsel may diverge substantially

from the honest recollection of a perceptive witness. If such a witness is represented at a deposition by counsel for a defendant company, the possibility cannot be discounted that the attorney may become faced with the need to impeach the testimony of his own client.

I have little doubt that if a clear conflict of this nature were to be perceived in advance, counsel immediately would disqualify himself from further representation of the witness. It also is true that, under the Code of Professional Responsibility of the American Bar Association,

> ". . . a lawyer may represent multiple clients if it is obvious that he can adequately represent the interests of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each." Section DR 5-105(C).

In all likelihood, each of the employee or former employee witnesses that the plaintiffs may want to depose would consent gladly to the dual representation, in order to have the services of a knowledgeable attorney without cost to him. The alternative of appearing without counsel or of using his

own funds to employ an attorney without previous experience in this litigation, is hardly of comparable attraction.

The defendants contend that once the witness has consented to the dual representation after full disclosure of a potential or actual conflict has been made, that is the end of the matter. They refer to In re Taylor, 567 F.2d 1183, 1191 (2d Cir. 1977), in support of the proposition that under these circumstances the court is ". . . without power unilaterally to obstruct the choce of counsel."

Thus far, the discussion in this memorandum has focused upon the application of Canon 5 of the Code of Professional Responsibility.[1] There, the concern is limited to the interests of the respective clients that are the subjects of dual representation. In such context, I believe it correct to say that if the clients consent after full disclosure, neither an opposing party nor the court is in position to complain. Melamed v. ITT Continental Baking Co., 592 F.2d 290 (6th Cir. 1979).

However, in the present situation, there are troublesome ethical considerations that are not limited to the protection of the interests of a prospective witness or of a defendant corporation.

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[1]Canon 5 asserts that "a lawyer should exercise independent professional judgment on behalf of a client."

A. The Determination Of The Need For Counsel.

[2] From the papers submitted and the comments made at the hearing on this issue, I have considerable doubt that the prospective deponents have any idea that they need an attorney when, upon being advised that their deposition is or may be sought, they contact a defendant employer or former employer. The likelihood is that they are offered counsel, either expressly or implicitly in being referred to the law firm representing such defendant. Thus, without any independent exercise of judgment on his part, a prospective witness finds himself under the guidance and protection of an attorney. For reasons discussed below, it is obvious that counsel for the defendant corporation is glad to have the attorney-client relationship established. But such desire scarcely could be in harmony with the requirements of "full disclosure" of any potential conflict of interest, e.g., unbiased testimony as opposed to defense partisanship.

The American Bar Association Committee On Ethics And Professional Responsibility was asked the following question:

> "In a civil suit, where one party (defendant) gives notice of taking depositions of independent witnesses (former employees of plaintiff corporation), is it proper for the attorney for the other party (plaintiff)

> to invite the noticed witnesses to engage him as attorney to represent them during their depositions, concurrently with his serving as attorney for the other party (plaintiff)?" Informal Ethics Opinions, page 437, Informal Decision No. 828, March 3, 1965.

The answer was a categorical "No," because of the problem of "solicitation". The factual situation referred to is not fully synonymous with the one here concerned, but it does have troublesome relevance.

B. Pre-Deposition Insulation.

[3] Under the circumstances here discussed, plaintiffs' counsel who contemplate deposing a presumably independent prospective witness suddenly find that neither they nor their representatives may properly seek to interview him without the presence, or at least the approval, of opposing counsel, who suddenly have become the attorneys for the witness. Thus, from a practical standpoint, the plaintiffs' counsel are unable to contact the potential witness on an informal basis in order to ascertain the nature and scope of his relevant knowledge and to assess the desirability of deposing him.

At the hearing concerning this issue, defense counsel asserted that ". . . there is no right to interview any witness unless he consents, and the preference of

some witnesses not to be interviewed without counsel of their choice or indeed at all is certainly understandable and cannot be said to create, as a matter of law, any kind of unfairness toward the plaintiff." (Rep.Tr. page 29.) If of course is true that "there is no right to interview any witness [informally] unless he consents." But the problem here is that the plaintiffs' counsel cannot even seek the consent of a prospective witness because intervention by the defendant and its counsel has insulated him against any such contact. In the meantime, defense counsel have full opportunity to "prepare" their "client" for his deposition.

C. Preparation For Deposition.

[4] It readily may be assumed that an employee or former employee of a defendant will welcome orientation and guidance from the latter upon learning that he may be called as a witness. Several years have passed since the pertinent events occurred, and it is fully appropriate for defense counsel to refresh the recollection of the witness as to the facts, familiarize him with the relevant documents, and cause him to understand fully the company's views and attitudes concerning the litigation. But such orientation can just as readily be provided in the absence of an attorney-client relationship, counsel for either side being free to confer with a prospective

witness to whatever extent the latter is agreeable. The only difference is that when such relationship exists, opposing counsel are prevented from inquiring into what went on at any such orientation session. Defense counsel insist that it would be "monstrous" not to preserve the attorney-client privilege against disclosure under such circumstances.

I am unable to agree. The following observation is believed to be very perceptive and pertinent.

> "The damage to testimony inflicted by the preparation of witnesses is very serious. Parties can hardly be expected to interview the potential witnesses in relatively detached ways that minimize the danger of interrogation to memory images. During the sessions devoted to 'coaching,' the future witness is likely to try to adapt himself to expectations mirrored in the interviewer's one-sided attitude. As a consequence, gaps in his memory may even unconsciously be filled out by what he thinks accords with the lawyer's expectations and are in tune with his thesis. Later, in court, these additions to memory images may appear to the witness himself as

> accurate reproductions of his original perceptions." Damaska, Presentation Of Evidence And Factfinding Precision, 123 U.Pa.L.Rev. 1083, 1094 (1975).

The witnesses with whom we are concerned may be partial to their employers, and some of them may be people through whom a defendant has acted in ways significant to this litigation. However, it must be remembered that they are not parties, and it is in the interests of justice that both sides be entitled to their testimony and be able to make full inquiry into any influences that may have affected such testimony. I think it inappropriate that an attorney-client relationship be established between such a witness and a party, thus frustrating such inquiry by the opposing side.

D. Instruction Not To Answer.

[5] In the course of a deposition, once it occurs, counsel for a witness can find many ways of protecting his client through objections, requests for clarification, instructing the witness not to answer, etc. Such interjections always are disruptive of the train of thought of the interrogator. Sometimes they are appropriate for the protection of the witness and his testimony; occasionally they are unnecessary for this purpose but nonetheless serve the interests of the interrogator's adversary. If the latter is also counsel

for the witness and instructs him not to answer, a question necessarily arises as to which client's interests he is serving. If his actions stem from any goal other than the protection of the witness, he has no right to give such an instruction. Even though, in due course, the court may resolve the issue and impose sanctions when appropriate, it is believed to be unfair to the interrogator for his opponent to have such authority over a non-party witness.

This court does not mean to suggest that counsel for any of the defendants intentionally have ignored an actual conflict in their representation of any witnesses or that they otherwise have engaged knowingly in any impropriety. However, for the reasons above stated, this court concludes that the establishment by counsel for a party in this litigation of an attorney-client relationship with a non-party witness creates a potential conflict that other parties readily could infer to be prejudicial. Such a relationship is not in harmony with Canon 9 of the Code of Professional Responsibility, which states that "a lawyer should avoid even the appearance of professional impropriety."

Defense counsel suggest that there is no judicial precedent for such a ruling and that it would be contrary to the law of the Ninth Circuit, citing Continental Oil Co. v. United States, 330 F.2d 347 (9th Cir. 1964). That decision is hardly definitive authority,

inasmuch as the propriety of the multiple representation there involved was neither challenged nor considered in any manner.

On the other hand, this court finds encouragement for its views in an opinion by the late Judge Snyder in the case of United States of America v. RMI, 467 F.Supp. 915, 922 (W.D.Pa. 1978). This was a criminal prosecution in which the court granted the Government's motion to disqualify counsel for corporate defendants from representing employees of such corporations that currently were or might subsequently be subpoenaed as witnesses for the Government. In the course of the opinion, the judge referred to the obligation of an attorney, under Canon 9, to "avoid even the appearance of professional impropriety," and then stated:

> "None of the disciplinary rules under Canon 9 deal specifically with the situation before the Court at this time, but the representation of a defendant in a criminal case and of a government witness who is also the defendant's employee could give such an appearance and is sufficient in itself to disqualify counsel from further representation of the witnesses."

A similar view is expressed in Opinion No. 290, rendered on April 27, 1973, by the Committee on

Professional Ethics of the New York State Bar Association:

> "The dual representation of a defendant and a witness in a criminal proceeding also appears to conflict with the traditional rules of our legal system in which the lawyer acts as an advocate for one party, and the witness, and his attorney, perform a different function. See, EC 5-9. To confuse the attorney's role by the representation of both a defendant and a witness in the same proceeding would present an appearance of impropriety. This a lawyer should avoid. Canon 9."

Also, in United States ex rel. Hart v. Davenport, 478 F.2d 203 (3d Cir. 1973), the opinion quoted with approval a portion of the opinion in In re Abrams, 266 A.2d 275, 278 (N.J. 1970):

> "It is inherently wrong to represent both the employer and the employee if the employee's interest may, and the public interest will, be advanced by the employee's disclosure of his employer's criminal conduct." 478 F.2d at 209.

It is recognized that these authorities were concerned with representation of defendants in criminal proceedings, with all of the Sixth Amendment

implications. Nonetheless, the above quoted observations are believed to have substantial application here. Serious antitrust violations of great national concern are charged. At this stage of the proceedings, I do not know what the facts are, but if there have been serious antitrust violations on the part of a defendant oil company, whether of a criminal nature or not, it is beyond doubt that "the public interest will . . . be advanced by the employee's disclosure . . ." thereof. In assessing the public interest, it should be remembered that these actions include damage claims brought by the plaintiff Attorneys General as parens patriae for their citizens as purchasers of petroleum products.

To the extent that this decision does go beyond established precedent, it is nonetheless adhered to because I believe it to be in accord with the interests of justice. To the extent that further support is needed, I rely upon the assertion in Hull v. Celanese Corporation, 513 F.2d 568, 571 (2d Cir. 1975), that "[I]n the disqualification situation, any doubt is to be resolved in favor of disqualification."

Defense counsel have reminded the court that "Privileged communications between counsel and corporate employees at all levels are vital to the task of advising the corporation on compliance with the antitrust laws." (Supplemental Memorandum of Socal, page 7.) This court agrees, and nothing in the order

here rendered is intended in any way to affect whatever privilege may otherwise exist between counsel for a company and an employee as to advice given or information exchanged with respect to current operations of the company. Problems concerning the existence or extent of such a privilege may or may not arise in the course of the testimony of an employee or former employee. Those matters are not involved in this order, which only precludes such counsel from now representing such a witness in preparing for and giving testimony in this litigation.

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

IN RE:	)
	)
COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION	) MDL DOCKET NO. 150 WPG) ALL STATE CASES) ORDER

In accordance with the Memorandum of Decision filed contemporaneously herewith,

IT IS ORDERED that all defense counsel of record and their respective law firms are disqualified from the representation of any employee (other than a current corporate executive) or former employee of a defendant corporation in any of these MDL 150 proceedings with respect to such person's capacity as a witness or prospective witness in these proceedings.

DATED: November 10, 1980.

WILLIAM P. GRAY
United States District Judge

Opposition

1

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No. 81-1286

IN THE

Supreme Court of the United States

October Term, 1981

STATE OF CALIFORNIA, *et al.*,
Petitioners,

v.

STANDARD OIL COMPANY OF CALIFORNIA, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals erred when it stated that *Upjohn Co. v. United States,* 449 U.S. 383 (1981), reversed the Third Circuit's "control group test" for the attorney-client privilege.

LIST OF PARTIES

Plaintiffs in the district court, appellees in the court of appeals, and petitioners in this Court:

City of Long Beach, California
State of Arizona
State of California
State of Florida ex rel. Jim Smith
State of Oregon
State of Washington

Defendants in the district court, appellants in the court of appeals, and respondents in this Court:

Amerada Hess Corporation
Atlantic Richfield Company[1]
Cities Service Company and
Cities Service Oil Company
Conoco, Inc.
Exxon Corporation[1]
Getty Oil Company
Gulf Oil Corporation[1]
Mobil Oil Corporation[1]
Phillips Petroleum Company[1]
Powerine Oil Company
Shell Oil Company[1]
Standard Oil Company of California
Standard Oil Company (Indiana)[1]
Standard Oil Company (Ohio)
Sun Company, Inc.[1]
Texaco Inc.[1]
Union Oil Company

[1] Parents, affiliates, and subsidiaries (other than wholly owned subsidiaries) are listed in the appendix.

Nonparties in the district court, appellants in the court of appeals, and respondents in this Court:

Brobeck, Phleger and Harrison
Leroy K. Cheney
Ralf Eccles
L. John Gandsey
Clinton E. Kelley
Howard K. Said
Charles F. Temme
Milford E. Tracy

Table of Contents

Question Presented i
List of Parties i
Table of Contents iii
Table of Authorities iv
Statement of the Case 1
Summary of Argument 5
Reasons for Denying the Writ 6
I. Petitioners Have Misstated the Clear and Correct Decision of the Court of Appeals 6
II. Petitioners Seek Only To Resurrect Questions Settled by This Court's Recent Decision in *Upjohn* 10
III. Petitioners' Questions Are Too Abstract and Speculative for Review by This Court 13
Conclusion 16
Appendix: Parents, Affiliates, and Subsidiaries (Other Than Wholly Owned Subsidiaries)

Table of Authorities

Cases

City of Long Beach, et al., v. Standard Oil Co. of California, et al., No. CV 75-2232 WPG (C.D. Cal.) 2 n.4, 15, 16

In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 658 F.2d 1355 (9th Cir. 1981) ..... 1 n.3, 3, 4, 5, 7, 8 & n.10, 9 & n.11, 13, 14, 15

In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 502 F. Supp. 1092 (C.D. Cal. 1980) 1 n.3, 2, 3, 7 n.9, 8

Order, In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, MDL No. 150 WPG (C.D. Cal. Nov. 12, 1980) 8

Hickman v. Taylor, 329 U.S. 495 (1947) 9 n.12

In re Petroleum Products Antitrust Litigation, 419 F. Supp. 712 (J.P.M.L. 1976) (per curiam) 2 n.5

State of Arizona v. Standard Oil Co. of California, et al., No. CV 76-3247 WPG (C.D. Cal.) 2 n.4

State of California v. Standard Oil Co. of California, et al., No. CV 76-2839 WPG (C.D. Cal.) 2 n.4

State of Florida ex rel. Smith v. Exxon Corp., et al., No. CV 76-2840 WPG (C.D. Cal.) 2 n.4

State of Oregon v. Standard Oil Co. of California, et al., No. CV 77-0615 WPG (C.D. Cal.) 2 n.4

State of Washington v. Standard Oil Co. of California, et al., No. CV 77-3487 WPG (C.D. Cal.) 2 n.4

United States v. United States Gypsum Co., 438 U.S. 422 (1978) 12

Upjohn Co. v. United States, 449 U.S. 383 (1981) ..... i, 4, 5, 6, 8 n.10, 9 n.12, 11, 12 & n.13, 13, 14, 16

MISCELLANEOUS

Canon 5, Code of Professional Responsibility 3

Canon 9, Code of Professional Responsibility 3, 4, 5, 7

Rule 501, Federal Rules of Evidence 14

Local Rule 1.3(d), United States District Court for the Central District of California 7, n.8

8 J. Wigmore, Evidence (McNaughton rev. 1961) 11

No. 81-1286

IN THE

Supreme Court of the United States

October Term, 1981

STATE OF CALIFORNIA, *et al.*,

Petitioners,

v.

STANDARD OIL COMPANY OF CALIFORNIA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

The undersigned respondents[2] respectfully request that the Court deny the Petition for Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Ninth Circuit in this case.[3]

STATEMENT OF THE CASE

Respondent corporations are among seventeen defendants in various combinations in six civil antitrust actions brought by

[2] Respondents submitting this brief are Mobil Oil Corporation, Atlantic Richfield Company, Leroy K. Cheney, Exxon Corporation, L. John Gandsey, Gulf Oil Corporation, Clinton E. Kelley, Phillips Petroleum Company, Shell Oil Company, Standard Oil Company (Indiana), Sun Company, Inc., Charles F. Temme, Texaco Inc., and Milford E. Tracy.

[3] *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 658 F.2d 1355 (9th Cir. 1981) (vacating 502 F. Supp. 1092 (C.D. Cal 1980) (MDL No. 150 WPG)).

plaintiffs the city of Long Beach, California, and the states of Arizona, California, Florida, Oregon, and Washington.[4] Plaintiffs, who are petitioners in this Court, allege that respondent corporations have engaged in unlawful acts that affected the price of crude oil or of petroleum products in violation of the federal antitrust laws. These civil actions have been consolidated for the purpose of pretrial proceedings in the United States District Court for the Central District of California.[5]

On May 28, 1980, plaintiffs Arizona, California, Florida, Oregon, and Washington moved the district court to preclude any defense counsel from representing any present or former corporate employee in this litigation. A companion motion to compel one such witness to answer two questions was withdrawn at oral argument and was never ruled on by the district court. On November 12, 1980, the court issued an opinion disqualifying counsel for the defendant corporations from representing any present or former employee, except a "current corporate executive," in that employee's capacity as a witness in these cases. *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation,* 502 F. Supp. 1092 (C.D. Cal. 1980). Respondent witnesses are persons who would have been deprived of their chosen counsel under that order.[6]

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[4] *City of Long Beach, et al., v. Standard Oil Co. of California, et al.,* No. CV 75-2232 WPG (C.D. Cal.); *State of Arizona v. Standard Oil Co. of California, et al.,* No. CV 76-3247 WPG (C.D. Cal.); *State of California v. Standard Oil Co. of California, et al.,* No. CV 76-2839 WPG (C.D. Cal.); *State of Florida ex rel. Smith v. Exxon Corp., et al.,* No. CV 76-2840 WPG (C.D. Cal.); *State of Oregon v. Standard Oil Co. of California, et al.,* No. CV 77-0615 WPG (C.D. Cal.); *State of Washington v. Standard Oil Co. of California, et al.,* No. CV 77-3487 WPG (C.D. Cal.). An eighteenth defendant, Thums Long Beach Company, is not a respondent.

[5] *In re Petroleum Products Antitrust Litigation,* 419 F. Supp. 712, 720 (J.P.M.L. 1976) (per curiam).

[6] The remaining respondent, Brobeck, Phleger, and Harrison, is a law firm that represents respondent Union Oil Company in this litigation.

The district court noted at the outset of its opinion that there was no conflict of interest in violation of Canon 5 of the Code of Professional Responsibility. *Id.* at 1096. It went on, however, to state that "there are troublesome ethical considerations that are not limited to the protection of the interests of a prospective witness or of a defendant corporation." *Id.* Four such considerations were identified. First, the court referred to solicitation, without suggesting that any solicitation had occurred or that it was likely to occur. *Id.* Second, the court speculated that the representation of employees by defense counsel had prevented plaintiffs from interviewing those employees, again without finding any impropriety or even noting a specific instance in which plaintiffs had been so hindered. *Id.* at 1096-97. Third, the court stated that the predeposition preparation of witnesses by defense counsel was not in the interest of justice, although once again specific findings were absent. *Id.* at 1097. Finally, the court commented that the participation of defense counsel in depositions by means of objections, requests for clarification, and advice not to answer an objectionable question is unfair to plaintiffs because of the possibility that counsel may be protecting clients other than the witness. *Id.* at 1097-98. The district court emphasized that "[t]his court does not mean to suggest that counsel for any of the defendants intentionally have ignored an actual conflict in their representation of any witnesses or that they otherwise have engaged knowingly in any impropriety," *id.* at 1098, and it recognized the possibility that its decision "does go beyond established precedent," *id.* at 1099. Nonetheless, the court determined that the representation of present and former corporate employees by defense counsel is "not in harmony with Canon 9 of the Code of Professional Responsibility, which states that 'a lawyer should avoid even the appearance of professional impropriety.'" *Id.* at 1098. Respondents filed notices of appeal and petitions for a writ of mandamus on November 26, 1980, and shortly thereafter.

A unanimous panel of the United States Court of Appeals for the Ninth Circuit vacated the district court order on October 13, 1981. *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation,* 658 F.2d 1355, 1362 (9th Cir. 1981). The

court of appeals held that although a disqualification order can be based on Canon 9, "[t]his court will affirm such an order only where the impropriety is clear and is one that would be recognized as such by all reasonable persons." *Id.* at 1361 (footnotes omitted). The court therefore phrased the main issue before it as follows:

> The crucial question is whether the concerns expressed [by the district court] are indeed present or merely anticipatory and speculative. In other words, did the court have a basis for finding apparent improprieties that were serious enough to outweigh the parties' interests in being represented by counsel of their choice?

658 F.2d at 1361. The court held that three of the four concerns expressed by the district court were insufficient to warrant interference with the right to counsel because they were more appropriately addressed to the organized bar, were a mere inconvenience, or could be dealt with by a narrower order. *Id.* at 1361-62. The court further determined that the remaining factor — the attachment of the attorney-client privilege to predeposition discussions — did not justify disqualification:

> In light of *Upjohn Co. v. United States*, 449 U.S. [383], 101 S.Ct. 677, 66 L.Ed.2d 584 (1981), which was decided after the district court entered its order, we are satisfied that the district court would have ruled the other way if *Upjohn* had been decided before the district court had to act.
>
> *Upjohn* undercuts factor No. 3, relied upon by the district court. The plaintiffs' attorneys may not discover what transpired in the "orientation session" whether or not the defense attorneys act as counsel for the witnesses at the deposition.[7]

---

[7] *Upjohn* reversed the Third Circuit's "control group" test for the scope of the attorney-client privilege in the corporate context. It held that information concerning potential violations transmitted by Upjohn's current employees to corporate counsel was privileged.

> . . . Although no findings were made, it is clear that at least some of the conversations referred to by the district court

> were made to counsel for the companies in order to secure legal advice for the company. The orientation sessions undoubtedly provided information which will be used by corporate counsel in advising the companies how to handle the pending lawsuit.

658 F.2d at 1361 & n.7. Appellees filed a petition for a writ of certiorari, which was docketed on January 11, 1982.

Summary of Argument

The questions identified by petitioners are not presented by the record below because they are based on a misstatement of the decision of the court of appeals and on a misreading of this Court's opinion in *Upjohn Co. v. United States*, 449 U.S. 383 (1981). In actuality, petitioners have merely invited the Court to reexamine *Upjohn*, and to do so on the basis of speculation and in the absence of a developed factual record. The Court should decline this invitation and deny the Petition for Writ of Certiorari.

The holding of the court of appeals related to the propriety of a disqualification order under Canon 9 of the Code of Professional Responsibility, an ethical question that petitioners have not raised in this Court. The attorney-client privilege was only at issue to the extent that it affected the assumptions and reasoning of the district court. Contrary to petitioners' claims, the court of appeals did not consider whether any specific communications were actually privileged.

In *Upjohn* this Court ruled unambiguously that "the narrow 'control group test' . . . cannot . . . govern the development of the law in this area." 449 U.S. at 397. Petitioners now assert that the "control group test" was only abolished for internal corporate investigations and that in litigation the "control group test" should in fact "govern the development of the law" in blatant disregard of the plain meaning of *Upjohn*. This claimed distinction is utterly without any support in the language of *Upjohn* or in its rationale.

Because the court of appeals did not rule on the applicability of the privilege to any specific conversation or to any specific witness, a decision by this Court would necessarily involve an

abstract proposition of law. Petitioners' need to resort to extravagant speculations concerning the potential effects of the decision below only underscores the inadequacy of the factual record. Petitioners' dire predictions also contrast sharply with their consistent record of representing their own present and former employees — and claiming the attorney-client privilege on their behalf — at depositions taken by respondent corporations.

Reasons for Denying the Writ

The Petition for Writ of Certiorari ("Petition") does not identify a conflict among the circuits or any other reason for granting the writ, save one — that the decision of the court of appeals is inconsistent with this Court's decision in *Upjohn Co. v. United States*, 449 U.S. 383 (1981). *See Petition* at 9. This brief will therefore be limited to a showing that no such inconsistency exists. The decision below is consistent with, and indeed compelled by, the opinion in *Upjohn*.

I. Petitioners Have Misstated the Clear and Correct Decision of the Court of Appeals.

Petitioners assert that "the Court of Appeals misinterpreted *Upjohn* and created a zone of silence so broad that the attorney-client privilege now shields *everything* said between *all* corporate employees and former employees and corporate counsel, irrespective of factual setting." *Petition* at 13 (emphasis in original). This is wrong. The court of appeals was not presented with and did not rule on any specific question relating to the existence of a privilege. Rather, it simply applied this Court's holding in *Upjohn* to a part of the rationale underlying the disqualification order and concluded that the rationale could not withstand the effect of the intervening decision. This abstract application was fully consistent with *Upjohn*, and in any event consideration by the Court of the attorney-client

privilege in this context would necessarily be theoretical and speculative.[7]

The question before the court of appeals was whether the disqualification order was justified under Canon 9 of the Code of Professional Responsibility. This issue, like most ethical issues, is essentially one of state rather than federal law,[8] and the Court has been understandably reluctant to grant certiorari in such cases. Petitioners have not even presented this issue for review.

Implicit in the district court's order was the assumption that the "control group test" for the attorney-client privilege would govern and that no privilege would attach to any discussion between counsel for a corporation and a nonexecutive employee unless the attorney represented the employee in an individual capacity.[9] This is apparent from the district court's comment that under its order "both sides . . . [would] be able to make full

---

[7] *See* section III *infra*.

[8] *See* 658 F.2d at 1358 & n.4. Local rule 1.3(d) of the Central District of California provides:

> *Standards of Professional Conduct.* Every member of the bar of this Court and any attorney permitted to practice in this Court under paragraph (b) hereof shall familiarize himself with and comply with *the standards of professional conduct required of members of the State Bar of California and contained in the State Bar Act, the Rules of Professional Conduct of the State Bar of California, and decisions of any court applicable thereto, which are hereby adopted as standards of professional conduct of this Court.* This specification shall not be interpreted to be exhaustive of the standards of professional conduct. In that connection, the Code of Professional Responsibility of the American Bar Association should be noted. No attorney admitted to practice before this Court shall engage in any conduct which degrades or impugns the integrity of the Court or in any manner interferes with the administration of justice therein.

(Emphasis added).

[9] Petitioners state that "[t]he District Court specifically drew its order to preserve all privileges that a party may legitimately claim." *Petition* at 4. The district court did state that its order would not affect the attorney-client privilege to the extent that it "may otherwise exist between counsel for a company and an employee as to advice given or information exchanged with respect to *current operations* of the company." 502 F. Supp. at 1099 (emphasis

inquiry into any influences that may have affected such [witness's] testimony," 502 F. Supp. at 1097, and from the exclusion of "current corporate executives" from the order, *see* Order, *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, MDL No. 150 WPG (C.D. Cal. Nov. 12, 1980). The court of appeals simply noted that this assumption was no longer valid in light of *Upjohn*, which "reversed the Third Circuit's 'control group' test for the scope of the attorney-client privilege in the corporate context." 658 F.2d at 1361 n.7. The invalidity of the district court's assumption undercut one of the four factors that the district court had relied on to support the order. *Id.* at 1361. Because the other three factors were also insufficient to justify disqualification, the court of appeals vacated the order. *Id.* at 1362.

The court of appeals did not address, much less modify, the substance of the attorney-client privilege.[10] Petitioners prominently quote a single sentence from the decision: "The plaintiffs' attorneys may not discover what transpired in the 'orientation session' whether or not the defense attorneys act as counsel for the witnesses at the deposition." 568 F.2d at 1631 (footnote omitted), *quoted in Petition* at 8. They neglect, however, to quote the pertinent section of a footnote to that sentence, and indeed even fail to indicate that a footnote has been omitted. The qualification states:

> *Although no findings were made*, it is clear that *at least some* of the conversations referred to by the district court were made to counsel for the companies in order to secure legal advice for the company. The orientation sessions undoubtedly provided information which will be used by corporate counsel in advising the companies how to handle the pending lawsuit.

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added). Because these cases concern the past activities of respondent corporations and only touch peripherally on "current operations," the order would have largely abrogated the privilege with respect to this litigation.

[10] Commenting on a question that was specifically reserved by this Court in *Upjohn*, 449 U.S. at 394 n.3, the court of appeals stated that the rationale behind *Upjohn* applies equally to former employees. 658 F.2d at 1361 n.7. Petitioners do not challenge this statement.

658 F.2d at 1361 n.7 (emphasis added). Petitioners' hyperbolic claims that the decision will frustrate the search for truth, protect disclosure of underlying facts and documents, and shield communications made in furtherance of future crimes, *Petition* at 18, are thus absurd.

Because the court of appeals did not rule that all conversations, or indeed any specific conversations, were in fact privileged, it had no occasion to analyze the contents of any conversation to determine which portions might be privileged.[11] Petitioners appear to recognize this, *see Petition* at 17, but nonetheless engage in a lengthy and contorted discussion about the distinction between "facts" and "communications," when a "communication" might become a "fact," and why "facts" are not the same as "advice." *See Petition* at 17-21. The short answer to this theoretical presentation is that it was not addressed by either the district court or the court of appeals and has nothing to do with either of the decisions below.[12]

Petitioners' efforts to characterize the decision of the court of appeals as a ruling on the substance of the attorney-client

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[11] The court of appeals did note that at least some of the predeposition conversations would undoubtedly be privileged. 658 F.2d at 1361 n.7. This is far, however, from a blanket declaration that the privilege covers "*everything* said between *all* corporate employees and former employees and corporate counsel, irrespective of factual setting." *Petition* at 13 (emphasis in original). The court of appeals merely found that the district court erred in assuming that *no* such conversations would be privileged because of the "control group test"; specific claims of privilege must still be judged on the basis of whether they meet the traditional requirements for application of the privilege.

[12] As the Court recognized in *Upjohn*, the privilege "puts the adversary in no worse position than if the communications had never taken place. The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney . . . ." 449 U.S. at 395. Petitioners' rather strained distinctions fall apart when the realities of a dialogue are considered. A flow of conversation necessarily results in a symbiotic relationship in which each question reflects the preceding answer and each answer influences the next question. For this reason, disclosure of only half the exchange (for example, the attorney's questions) would reveal a great deal about the other half as well (for example, the witness's responses). Even if petitioners' artificial boundaries are accepted,

privilege is thus in conflict with a plain reading of that decision. The court of appeals merely applied this Court's holding in *Upjohn* to a part of the rationale behind the district court's order. Because that rationale hinged on the assumption that the "control group test" would determine claims of attorney-client privilege, it could not withstand the conclusion that the "control group test" would not in fact apply. The key ruling of the court of appeals on this question was therefore that *Upjohn* reversed the "control group test." As shown below, this ruling is not only consistent with *Upjohn*, it is compelled by that decision.

II. Petitioners Seek Only To Resurrect Questions Settled by This Court's Recent Decision in *Upjohn*.

Petitioners assert that the court of appeals misinterpreted this court's decision in *Upjohn*. *Petition* at 13. This claim rests on petitioners' own interpretation that "[i]n *Upjohn*, this Court decided that the 'control group test' for purposes of the attorney-client privilege does not serve the privilege *in the setting of a self-initiated corporate internal investigation.*" *Petition* at 11-12 (emphasis added). In contrast, petitioners urge, *"[i]n the context of the large MDL-150 litigation here,* the control group test preserves the proper balance between efficient discovery procedures and the policy of the attorney-client privilege." *Petition* at 16 (emphasis added). Thus, the "inconsistency" on which the Petition is based, *see Petition* at 9, consists of a distinction between the applicability of the privilege to existing litigation and its applicability outside the context of litigation. This purported distinction is found nowhere in *Upjohn* itself and is contrary to its clear holding; if it has any significance at all, it only reemphasizes the importance of the privilege once litigation has commenced.

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therefore, it would generally be impossible as a practical matter to segregate half of a continuing exchange as privileged, and at the same time reveal the other half. Petitioners also ignore that an attorney's characterization of "facts," even if it does not fall under the attorney-client privilege, would likely qualify as attorney work product. *See id.* at 400-01. See generally Hickman v. Taylor, 329 U.S. 495 (1947).

The attorney-client privilege has been in existence since at least the early 1500s, when testimonial compulsion first became generally authorized. 8 J. Wigmore, *Evidence* § 2290, at 542-43 (McNaughton rev. 1961). It has always applied to litigation, but only much later was it extended to include internal investigations like the one at issue in *Upjohn*:

> [T]he attorney's exemption was by the original theory limited to communications received since the beginning of the *litigation at bar* and for its purposes only. . . .
>
> . . . [A]n extension of the attorney's exemption of course took place to include communications made, first, during any other litigation; next, in contemplation of litigation; next, during a controversy but not yet looking to litigation; and, lastly, in any consultation for legal advice, wholly irrespective of litigation or even of controversy. But this gradual extension occupied (in England, at least) nearly a hundred years of judicial annals, and the shackles of the earlier precedents were not finally thrown off until the decade of 1870.

Id. at 544-45 (footnotes omitted); *accord, id.* § 2294, at 558-65. In *Upjohn* the Court, in language clearly encompassing litigation as well as other forms of legal advice, confirmed the continuing vitality of the privilege:

> The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961). Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice *or advocacy* serves public ends and that such advice *or advocacy* depends upon the lawyer being fully informed by the client.

449 U.S. at 389 (emphasis added).

In *Upjohn* the Court reviewed a decision of the Court of Appeals for the Third Circuit, which had held that the attorney-client privilege does not protect any communications

between counsel for a corporation and corporate employees except those employees who are members of the "control group." *See id.* at 390. The Court unanimously reversed that holding. *Id.* at 397.[13]

The critical flaw in the "control group test" is that it ignores the need of counsel to be fully informed of the facts. *Id.* at 390. As the Court noted, "[t]he first step in the resolution of *any* legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant." *Id.* at 390-91 (emphasis added). Corporate employees beyond the "control group" will often be the sole repositories of corporate knowledge concerning the events in question: "Middle-level — and indeed lower-level — employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such *actual or potential* difficulties." *Id.* at 391 (emphasis added). The "control group test" therefore "frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation." *Id.* at 392.

The deficiencies of the "control group test," which were recognized in *Upjohn* in the context of potential litigation, are even more apparent once litigation has become actual. At that point the importance of the privilege increases with the heightened significance of the legal advice rendered and with the correspondingly greater need for the legal advisor to know the facts. The need to ascertain all the facts is especially acute in the context of complex antitrust litigation, since "compliance with the law in this area is hardly an instinctive matter, see, *e.g., United States* v. *United States Gypsum Co.*, 438 U.S. 422, 440-441 (1978) ('the behavior proscribed by the [Sherman] Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct')." 449

[13] The Chief Justice, who authored a separate opinion, concurred in the reversal of the "control group" test. *Id.* at 402 (Burger, C.J., concurring).

U.S. at 392-93 (footnote omitted; insertion in original). Application of the "control group test" as soon as a complaint is filed would cripple counsel's ability to defend the corporate client at precisely that moment when the potential consequences of faulty legal advice are greatest.

The importance of the privilege in the context of litigation is confirmed by the situation at issue here. The special knowledge of these particular employees is shown by the very fact that petitioners have noticed their depositions. It is therefore obvious that they can provide "information which will be used by corporate counsel in advising the companies how to handle the pending lawsuit" and that "at least some of the conversations referred to by the district court were made to counsel for the companies in order to secure legal advice for the company." 568 F.2d at 1361 n.7.

The Court in *Upjohn* concluded that "the narrow 'control group test' sanctioned by the Court of Appeals in this case cannot . . . govern the development of the law in this area." 449 U.S. at 397. This clear holding was restated almost literally by the Court of Appeals for the Ninth Circuit when it ruled that "*Upjohn* reversed the Third Circuit's 'control group' test for the scope of the attorney-client privilege in the corporate context." 658 F.2d at 1361 n.7. Therefore, the only issue raised by petitioners is whether this Court should reconsider its recent unanimous decision in *Upjohn*. Respondents respectfully submit that petitioners have identified no reason for doing so.

III. Petitioners' Questions Are Too Abstract and Speculative for Review by This Court.

Even if the Court were inclined to reexamine *Upjohn*, the Petition offers a poor vehicle for a definitive ruling on the attorney-client privilege. In *Upjohn* the Court noted: "We are acutely aware . . . that we sit to decide concrete cases and not abstract propositions of law." 449 U.S. at 386. Petitioners have presented the Court with an utterly sterile issue: Whether the court of appeals properly stated the holding of a recent decision of this Court. There is absolutely no factual record concerning the identities of particular witnesses or the nature of specific

communications that may or may not be privileged. A decision by this Court on the applicability of the privilege would necessarily involve the type of abstract proposition of law that was shunned in *Upjohn*.

Petitioners seem to recognize the inadequate factual record in their statement that the district court "avoided the practical quagmire of delineating the scope of the attorney-client privilege in the context of pending litigation by precluding an attorney-client relationship between corporate defense counsel and non-party witnesses." *Petition* at 5. The district court in effect entered a blanket order that avoided an imagined "practical quagmire" only by sacrificing the rights of respondents.[14] The *per se* ruling was in plain violation of Rule 501 of the Federal Rules of Evidence, which commands that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." *See* 449 U.S. at 396-97. The order was therefore well outside the discretion of the district court. *See* 658 F.2d at 1358.

Petitioners now seek to rehabilitate the factual record by supplementing it with a series of hypothetical horrors that they claim *may* result from the decision of the court of appeals. *See, e.g., Petition* at 9 (decision "poses the potential" of complicating judicial administration); *id.* at 11 (decision "suggests" that privilege may be used as procedural sword); *id.* at 20 (decision "apparently" forecloses petitioners from inquiring about facts). As shown above, these spectres emanate from petitioners' misreading of both *Upjohn* and the decision below. Likewise, petitioners resort to innuendo when they imply that counsel may abuse the privilege and bias the testimony of witnesses. *See Petition* at 13, 19. In a final effort to buttress the record, petitioners pose a series of hypothetical questions that were not addressed by either the district court or the court of appeals. *See Petition* at 20. This Court should not put itself in the position of

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[14] In addition to infringing the rights of respondent corporations, the order infringed the rights of respondent witnesses and other witnesses, who were deprived of their chosen counsel without justification.

issuing an advisory opinion on questions that form no part of the factual record in these cases.

Despite petitioners' rhetoric, the simple fact is that of the "scores, if not hundreds, of lawyers" involved in this litigation, *Petition* at 4, not a single attorney representing a defendant has been found to commit any impropriety. The court of appeals correctly held in this context that if an impropriety should ever be shown, it could be dealt with in the first instance through discovery sanctions or narrowly drawn orders regulating discovery. 658 F.2d at 1361-62. Petitioners denigrate this option as calling for "witness-by-witness hearings." *Petition* at 8.[15] When and if petitioners ever show a single abuse, they can then raise the purported difficulties of showing multiple abuses. *See* 658 F.2d at 1361-62.

Petitioners' wholesale allegations contrast sharply with their own behavior.[16] Of the sixteen depositions that respondent corporations have taken in the *Long Beach* case of present and former employees of the city of Long Beach and the state of California, attorneys for the city have represented the witness in twelve of those depositions.[17] In another deposition they asserted an inherent right to represent a current city employee, although that employee had not requested representation. Deposition of John W. Parkin at 11-12, *City of Long Beach, et al., v. Standard Oil Co. of California, et al.*, No. CV 75-2232 WPG (C.D. Cal. Mar. 11, 1981). In yet another deposition an attorney for the state of California declared flatly that "[n]ormally the state

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[15] As a result, petitioners speculate that the decision of the court of appeals "will prolong large antitrust cases." *Petition* at 7. Separate representation of each witness by counsel that is unfamiliar with this litigation, as Petitioners suggest, would only add additional lawyers and attendant delays, including the delay that would be necessary for counsel to acquire even minimal familiarity with the litigation.

[16] The district court order was notably one-sided: It disqualified defense counsel, but left plaintiffs' counsel free to represent employees of plaintiffs.

[17] Attorneys for the city have represented the witness at the depositions of one current city employee, three former city employees, six current state employees, and two former state employees.

of California — and this is not a speech; I am just stating — takes the position that we represent all former employees as far as their capacity as state employees, whatever agency they work for." Deposition of Houston I. Flournoy at 226, *City of Long Beach, et al., v. Standard Oil Co. of California, et al.,* No. CV 75-2232 WPG (C.D. Cal. Aug. 12, 1981). Thus, in fourteen of the sixteen depositions of petitioners' present and former employees, counsel for petitioners have appeared as the witness's personal attorneys or have asserted a right to represent the witness regardless of the witness's own wishes. Respondents respectfully suggest that this Court measure the validity of petitioners' speculations by the yardstick of their own behavior.

Conclusion

Petitioners have identified no basis for invoking this Court's discretionary jurisdiction. The decision of the court of appeals was correct and was fully consistent with this Court's holding in *Upjohn Co. v. United States,* 449 U.S. 383 (1981). The undersigned respondents therefore ask the Court to deny the Petition for Writ of Certiorari.

Dated: February 10, 1982

Respectfully submitted,

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Appendix: Parents, Affiliates, and Subsidiaries (Other Than Wholly Owned Subsidiaries)

Atlantic Richfield Company

Alyeska Pipeline Service Company
Badger Pipe Line Company
Black Lake Pipe Line Company
Chapin, Kieley & Howe, Inc.
Colonial Pipeline Company
Cook Inlet Pipe Line Company
Delaware Bay Transportation Company
Dixie Pipeline Company
East Texas Salt Water Disposal Co.
Flower Street Limited
Gas De Chile S.A.
Gravity Adjustment, Inc.
Hardy Oil Company
Hydrokem Performance Chemicals Company
Iricon Agency Ltd.
Kenai Pipe Line Company
Lavan Petroleum Co.
Montoro, Empresa Para La Industria Quimica
Nihon Oxirane Company, Ltd.
Oil Shippers Service, Inc.
Ontario Terminals Inc.
Platte Pipe Line Company
Sinclair Venezuelan Oil Company
Tecumseh Pipe Line Company
Texas-New Mexico Pipe Line Company
Trans Mountain Oil Pipe Line Company

Exxon Corporation

Exxon Pipeline Corporation
Imperial Oil Company
Reliance Electric Company

Gulf Oil Corporation

A/S Jargul
A/S Jargul & Co. K/S

Albert Rose Chemicals, Ltd.
Allied-General Nuclear Services
Asia Polymer Corp.
China Gulf Oil Company Limited
China Gulf Plastics Corporation
Colonial Pipeline Company
Compagnie D-Investissement
  Bustibles De Reacteurs A
  Haute Tp
Delaware Bay Transportation Company
Dixie Pipeline Company
Ethyleen Pijpleiding
  Maatschappij (Belgium) S.A.
Ethyleen Pijpleiding
  Maatschappij (Nederland) B.V.
Explorer Pipeline Company
General Atomic Company
Gulf Canada Limited
Gulf Oil Zaire S.A.R.L.
Harshaw Galvanotecnia
Harshaw Quimica Ltda.
Hochtemperatur Reaktorbau GMBH
Industrias Vencedor S.A.
Insco Holding & Finance Company N.V.
Interquimica S.A.
Keydril (Nigeria) Limited
Kuwait Oil Company Limited
Laurel Pipeline Company
London Oil Refining Company Limited
Mid-Valley Pipeline Company
Midwest Carbide Corporation
Oil Shippers Service, Inc.
Oklahoma Nitrogen Company
Paloma Pipe Line Company
Pembroke Capital Company
Pembroke Cracking Company
Plastigama, S.A.
Platte Pipeline Company

Pol Transport AB
Raffinerie De Cressier S.A.
Rio Blanco Oil Shale Partnership
Sarni S.P.A. — Refining
Societe de Combustible Pour
Reacteurs A Haute Temperature (Corhat)
Solvent Refined Coal International, Inc.
Sunrise International Company Limited
Taita Chemical Corporation
Venezuela Gulf Refining Co.
West Texas Gulf Pipe Line Co.

MOBIL OIL CORPORATION

AB Djurgardsberg
Abu Dhabi Petroleum Company Limited
Adria-Wien Pipeline Gesellschaft m.b.H.
AIMCO (ALPHA) Shipping Company
AIMCO (OMEGA) Shipping Company Ltd.
Aircraft Fuel Supply B.V.
Airtankdienst Koln
AK Chemie GmbH
AK Chemie GmbH & Co. KG
Akauma Rekisei Kogyo Kabushiki Kaisha
Alexandroupolis Petroleum Installation S.A.
Allied Asphalts Limited
Alpa Alet Ve Dayanikli Tuketim Mamulleri Pazarlama A.S.
Altona Petrochemical Company Limited
Alyeska Pipeline Service Company
Ammenn GmbH
Ankara Gaz Satis Anonim Sirketi
Arabian American Oil Company
Arabian International Maritime Company Limited
Arabian International Maritime Company
The Arabian Petroleum Supply Company (S.A.)
Aral Aktiengesellschaft
A/S Fjellvegen
A/S Kongens Plass I
A/S Moretral
The Associated Octel Company Limited

Associated Octel Company (Plant) Limited
ATAS—Anadolu Tasfiyehanesi Anonim Sirketi
Atlas Sahara S.A.
Australasian Petroleum Company Proprietary Limited
Australian Synthetic Rubber Company Limited
Autobahn-Betriebe Gesellschaft m.b.H.
Aviation Fuel Services Limited
Aygaz Anonim Sirketi
B.V. Beheersmaatschappij MOBEM
Basrah Petroleum Company Limited
Bataan Refining Corporation
Bayerische Erdgasleitung GmbH
Bayerische Mineral-Industrie A.G.
Benoil S.A.
Bostadsrattsforeningen Basunen, Malmo
Bostadsrattsforeningen Forarsatet, Orby
Bostadsrattsforeningen Silverskatten, Trelleborg
Bostadsrattsforeningen Skepparegarden, Norrkoping
Brazos Heights Housing Incorporated
Brussels Airfuels Service S.C.
Buffalo River Improvement Corporation
Canner's Steam Company, Incorporated
Cansulex Limited
Canyon Reef Carriers, Inc.
Cartoenvases Valencia, S.A.
Carton de Colombia, S.A.
Carton de Venezuela, S.A.
Cartones Nationales, S.A.
Celmisia Shipping Corporation
Celulosa y Papel de Columbia, S.A.
Central African Petroleum Refineries (Pvt) Limited
Central Kagaku Kabushiki Kaisha
Cercera S.A.
Changi Airport Fuel Hydrant Installation Pte. Ltd.
Chuo Nenryo Gas Kabushiki Kaisha
Colombianos Distribuidores de Combustibles, S.A. (CODI)
Colonial Pipeline Company
Combustibles Colmerauer

Comet-Brennstoffdienst GmbH
Comex-Seal France S.A.
Comex-Seal Guernsey Ltd.
Comex-Seal Limited
Comex-Seal U.K. Limited
Comex-Seal U.S. Corporation
Compagnie Africaine de Transport Cameroun
Compagnie D'Entreposage Communautaire
Compagnie Immobiliere (Comimmo)
Compagnie Regionale de Distribution de Produits Petroliers-C.O.R.E. Dis.
Compagnie Rhenane de Raffinage
Compagnie Senegalaise des Lubrifiants (C.S.L.)
Compania Colombiana de Empaques Bates, SSA
Compania de Lubricants de Chile Limitada (Copec-Mobil Ltda.)
Compania Mexicana de Especialidades Industriales, S.A. de C.V.
Consortium Raymond Duez
Constructora Calle 70, S.A.
Cook Inlet Pipe Line Company
CORCOP
Corrugadora de Carton, S.A.
C.R.C. Lyon Chauffage
CRCP
Croager Bros. (1962) Limited
Cyprus Petroleum Refinery Limited
D. Muhlenbruch GmbH
D. Muhlenbruch GmbH & Co. KG
Dai Nippon Jushi K.K.
De. Ba. Deposito di Bari S.p.A.
Depot Petrolier de Mourepiane
Depot Petrolier du Gresivaudan
Depot de Petrole Cotiers
Depots Petroliers de La Crose (DPLC)
Deutsche Mobil Oil Exploration Ireland Ltd.
Deutsche Pentosin-Werke GmbH
Deutsche Transalpine Oelleitung GmbH

Dicomi S.r.l.
Dixie Pipeline Company
Drivmedelscentralen AB
Dukhan Services Company
East Japan Oil Development Company Ltd.
Eastern Lease Company Ltd.
Emoleum (Asphalts) Limited
Entrepot Petrolier de Chambery
Entrepot Petrolier de Dijon
Entrepot Petrolier de Mulhouse (E.P.M.)
Entrepot Petrolier de Nancy
Entreprise Jean Lefebvre
Erdgas-Verkaufs-Gesellschaft mbH
Erdoel-Lagergesellschaft mbH
Erdoel-Raffinerie Neustadt GmbH & Co. oHG
Erdoelbetrieb Reitbrook
Erdoelraffinerie Gesellschaft mbH in Liquidation
Establissments Bouthenet
Establissements Nicol and Cie
Faavang Autoverksted A/S
FACEL
Felix Oil Company
Filtroleo-Sociedade Portuguesa de Filtros Lda.
Filtros De Costa Rica S.A.
Finsbury Printing Limited
Fountain Garage (Alfreton Road) Ltd.
Fountain Garage (East Park) Ltd.
Fountain Garage (Halesowen) Ltd.
Fountain Garage (Leyton) Ltd.
Fountain Garage (Meadowhead) Ltd.
Fountain Garage (Mercury) Ltd.
Fountain Garage (Newbury Park) Ltd.
Fountain Garage (Sale) Ltd.
Fountain Garage (Stirchley) Ltd.
Fountain Garage (Wednesbury) Ltd.
Frome-Broken Hill Company Proprietary Limited
Fruehmesser Mineraloelhandels GmbH & Co. KG
Fruehmesser GmbH

Fuso Operations Kabushiki Kaisha
Futuro Enterprises (Christchurch) Ltd.
Futuro Homes (N.Z.) Ltd.
Gas Aletleri Anonim Sirketi
Geomines-Caen
Geovexin
Germ Lubricants Limited
Ghana Bunkering Services Limited
Goteborgs Branslesorterir.g AB
Groupement Immobilier Petrolier G.I.P.
Groupement Petrolier Aviation G.P.A.
Groupement Petrolier De Brest (GPB)
Handelmaatschappij Hugenholtz & Co. B.V.
H.E. Oils Limited
Heizoel-Handelsgesellschaft mbH
Hellas Gas Storage Company S.A.
Highgate Associates, Ltd.
Home Counties Petroleum Products Limited
Hormoz Petroleum Company
Hydranten-Betriebs-Gesellschaft, Flughafen Frankfurt
Imperial Gas Co. of P.R., Inc.
Industria de Carbon del Valle Cauca, S.A.
Iranian Oil Participants Limited
Iranian Oil Services (Holdings) Limited
Iranian Oil Services Limited
Iraq Petroleum Company, Limited
Iraq Petroleum Pensions Limited
Iraq Petroleum Transport Company Limited
Island Exploration Company Proprietary Limited
Istanbul Petrol ve Makine Yaglari Limited Sirketi
Japan Airport Fueling Service Co. Limited
Japan Solar Energy Co., Ltd.
J.E.C.O.P.
K. Allan & Company Limited
K. K. Sankyo Plastics
K. K. Toresen
Kanto Kygnus Sekiyu Hambai K. K.
Kanto Oil Pipeline Co., Ltd.

Kawasaki Kygnus Sekiyu Hambai Kabushiki Kaisha
Keihin Kygnus Sekiyu Hambai Kabushiki Kaisha
Keiyo Sea-Berth Company, Limited
Kettleman North Dome Association
Klaus Koehn GmbH
Klaus Koehn GmbH & Co. Mineraloel KG
Kobe Port Service Kabushiki Kaisha
Kurt Ammenn GmbH & Co. K.G.
Kygnus Ekika Gas Kabushiki Kaisha
Kygnus Kosan Kabushiki Kaisha
Kygnus Sekiyu Kabushiki Kaisha
Kyokuto Petroleum Services Overseas, Ltd.
Kyokuto Sekiyu Kogyo Kabushiki Kaisha
Les Nouveaux Comptoirs Petroliers
Les Supermarches De Cote D'Ivoire
Lubricantes del Sur, S.A.
Marceau & Cie
Matco Tankers (U.K.) Limited
Maury Manufacturing Company, Inc.
Mediterranean Refining Company
Meentzen & Franke GmbH & Co.
Michael Beecham Limited
Mobil Ami, S.A.
Mobil Atlas Sociedad Anonima de Capital Variable
Mobil Chemie Belgie N.V. and Mobil Chimie Belge S.A.
Mobil-Comercio, Industria e Servicos Ltda.
Mobil Corporation
Mobil Gaz-Mobil Petrol Gazlari. Anonim Sirketi
Mobil Korea Lube Oil Industries Inc.
Mobil Motor Rest AG
Mobil Oil Angola, SARL
Mobil Oil Cameroun
Mobil Oil Cote d'Ivoire
Mobil Oil Dahomey
Mobil Oil Djibouti, S.A.
Mobil Oil Francaise
Mobil Oil Gabon

Mobil Oil Ghana Limited
Mobil Oil Haute Volta
Mobil Oil Holdings S.A.
Mobil Oil Mali
Mobil Oil Maroc
Mobil Oil Mauritanie
Mobil Oil Niger
Mobil Oil Nigeria Limited
Mobil Oil Nord-Africaine
Mobil Oil Philippines Inc.
Mobil Oil Portuguesa, S.A.R.L.
Mobil Oil Rwanda-Burundi (S.A.R.L.)
Mobil Oil Senegal
Mobil Oil Tchad
Mobil Oil Togo
Mobilrex
Mobil Tunisie
Mobil Tyco Solar Energy Corporation
Modern Buildings Membranes Ltd.
Molinos de Carton y Papel, S.A.
Morem
Mosul Petroleum Company Limited
Motel Rest SA
Motrate Products Limited
Mt. Marrow Blue Metal Quarries Pty.
Ndola Oil Storage Company Limited
Near East Development Corporation
The New Zealand Refining Company Limited
New Zealand Synthetic Fuels Corp. Ltd.
Nichimo Sekiyu Seisei Kabushiki Kaisha
Nippon Unicar Company Limited
Norddeutsche Erdgas-Aufbereitungs GmbH
Nordic Storage Company Ltd.
Nottingham Gas Limited
N.V. Rotterdam-Rijn Pijpleiding Maatschappij
N.V. Socony-Standard-Vacuum Oil Company
Occidental de Empaques, Ltda.
Octel Associates

Octel S.A.
Oil Kol (Proprietary) Limited
Oil Service Company of Iran (Private Company)
Oldenburgische Erdoel Gesellschaft mit beschrankter Haftung
Olympic Pipe Line Company
Osage Pipe Line Company
P.T. Arun Natural Gas Liquefaction Company
P.T. Stanvac Indonesia
Paloma Pipeline Company
Pars Investment Corporation
Pembalta Gas System No. 1 Ltd.
Pembalta Gas System No. 3 Ltd.
Pembalta Gas System No. 4 Ltd.
Pembalta Gas System No. 5 Ltd.
Pembalta Gas System No. 6 Ltd.
Perretti Petroli S.p.A.
Petrocab
Petrogas Processing Ltd.
Petroleum Development (Cyprus) Limited
Petroleum Refineries (Australia) Proprietary Limited
Petroleum Services (Middle East) Limited
Petroleum Tankship Company Inc.
Petromin Lubricating Oil Company
Petromin Lubricating Oil Refining Company
Pipe-Lines de la Pallice
Plegadizos para la Industria S.A.
Poly Oil Chimie (P.O.C.)
Qatar Petroleum Company Limited
Qualbank, Inc.
Ragosine Oil Company Limited
Rainbow Pipe Line Company, Ltd.
Randhurst Corporation
Reforestadora Andina, S.A.
Reforestadora del Cauca, S.A.
Rhodes Petroleum Installation S.A.
Rivers Court Estates, Limited
Roc Lubricants Limited

Roc Lubricants (OCL) Limited
Rohel-Aufsuchungs Gesellschaft mbH
Ruhrgas Aktiengesellschaft
S&M Pipeline Limited
S.A. Mas & Cie
S.A.M. Lebreton
Samarco (Alpha) Shipping Company
Samarco (Beta) Shipping Company
Sanwa Kasei Kogyo Kabushiki Kaisha
SARL Garage Pineau
Sarni S.p.A.
Saudi Arabian Maritime Company
The Saudi Can Company, Ltd.
Saudi Chemical Industries Company Limited
Saudi Maritime Company Ltd.
Saudi Yanbu Petrochemical Company
Schubert Kommanditgesellschaft
S.C.I. Du Fonds Du Val
Seal Participants (Holdings) Limited
Segher de Mexico, S.A. de C.V.
Seibu Kygnus Sekiyu Hambai Kabushiki Kaisha
SENERCO
Seram Societa per Azioni (S.p.A.)
The Sierra Leone Petroleum Refining Company Limited
R. Simonnet & CIE
Socalor
Sociedade Portugal Marrocos SARL
Societa Italiana per l'Oleodotto Transalpino, S.p.A.
Societe Africaine de Raffinage
Societe Agicole Des Entreprises Petrolieres (S.A.D.E.P.)
Societe Anonyme Etablissment Nicol and Cie
Societe Belge de Transport par Pipeline S.A.
Societe Camerounaise des Depots Petroliers (S.C.D.P.)
Societe Camerounaise Equatoriale De Fabrication De Lubrifiants "S.C.E.F.L."
Societe Civile de Mustapha
Societe Civile Immobiliere Courcelles-Etoile
Societe Civile Immobiliere de Construction de 34 Avenue du General Leclerc a Boissy-St-Leger

Societe Civile Immobiliere de Construction "La Residence Brune"
Societe Civile Immobiliere du 10 Bd. de la Republique A La Garenne-Colombes
Societe Civile Immobiliere Kleber-Etoile
Societe Civile Immobiliere La Fontaine Saint Lucien
Societe Civile Immobiliere Mobil
Societe Dahomeenne d'Entreposage de Produits Petroliers
Societe d'Armement Fluvial et Maritime "SOFLUMAR"
Societe de Construction & de Gestion CB 12
Societe de Distribution Castelroussine (SODICA)
Societe de Gaz D'Oceanic (SOGADOC)
Societe de Manutention de Carburants Aviation (S.M.C.A.)
Societe de Manutention de Carburants Aviation Dakar-Yoff
Societe de Manutention de Carburants Aviation de Tahiti (SOMCAT)
Societe de Maperialx d' Etancheite Pour Le Entreprises (Meple)
Societe d'Entreposage de Bobo-Dioulasso (S.E.B.)
Societe d'Entreposage d'Hydocarbures de Bingo (SEHBI)
Societe d'Entreposage de San Pedro (SESP)
Societe d'Entreposage Petrolier au Burundi
Societe de Renovation D'Emballages Metalliques (Rem)
Societe d'Habitations a Loyer Modere de la Seine Maritime
Societe des Bitumes et Cut-Backs du Cameroun
Societe des Etablissements Goux
Societe Des Huiles Lemahieu
Societe de Pipe-Line Sud-Europeen
Societe Francaise Stoner-Mudge
Societe Gabonaise d'Entreposage de Produits Petroliers
Societe Gabonaise de Raffinage
Societe Industrielle des Asphaltes et Petroles de Lattaquie (Syrie) S.A.
Societe Ivoirienne de Fabrication de Lubrifiants (S.I.F.A.L.)
Societe Ivoirienne de Raffinage
Societe Mauritanienne d'Entreposage de produits Petroliers
Societe Nationale de Raffinage (Sonara)

Societe Nouvelle Raffinerie Meridionale De Ceresines (RMC)
Societe Novodis
Societe Pizo De Formulation De Lubriflants (PIZOLUB)
Societe Regionale De Produits Petroliers
Societe Tahitienne de Depots Petroliers
Societe Tchadienne d'entreposage de Produits Petroliers
Societe Togolaise d'Entreposage (STE)
SOMODIP
Sonarep (South Africa) (Proprietary) Limited
SONEX
South African Oil Refinery (Proprietary) Limited
South Saskatchewan Pipe Line Company
South West Africa Road Binders (Proprietary) Limited
Statfjord Transport A.S.
Station-Service Lunes
Sydney Metropolitan Pipeline Pty. Ltd.
Syria Petroleum Company Limited
T.R. Miller Mill Company, Inc.
Tanklagergesellschaft Koln-Bonn
Tecklenburg GmbH
Techlenburg GmbH & Co. Energiebedarf K.G.
Texoma Pipe Line Company
Thailand Lubricant Products Limited
Thailand Solvent Products, Ltd.
Thomas Moscrop (Lion Oils) Limited
Thums Long Beach Company
Toa Nenryo Kogyo Kabushiki Kaisha
Tohko Plastics Co., Ltd.
Tonen Energy International Corp.
Tonen Sekiyu Kagaku Kabushiki Kaisha
Tonen Tanker Kabushiki Kaisha
Tonen Technology Kabushiki Kaisha
Total Centrafricaine de Gestion (TOCAGES)
Toulouse — Distribution Produits Petroliers
Toyoshina Film Co., Ltd.
Transalpine Finance Holdings S.A.
Transalpine Oelleitung in Oesterreich Gesellschaft m.b.H.
Trans-Arabian Pipe Line Company

Transgas Umschlags-Lager-Und Transport Gesellschaft MbH
Turkish Petroleum Company Limited
Twifo Oil Plantations Ltd.
UBAG Unterflur Betankungsanlage Flughafen Zurich
Union Grafica, S.A.
United Kingdom Oil Pipelines Limited
VOSACEC, S.P.A.
W.A.G. Pipeline Pty. Ltd.
Wako Kasei Kabushiki Kaisha
Wakohjushi Kabushiki Kaisha
Werner Weidemann Mineraloelvertrieb G.m.b.H
West Shore Pipe Line Company
Wolverine Pipe Line Company
Wyco Pipe Line Company
Zaire Mobil Oil
Zaire Services Des Entreprises Petrolieres

PHILLIPS PETROLEUM COMPANY

Acurex Corporation
Aero Oil Company
Alyeska Pipeline Service Company
Bruin Carbon Dioxide Sales Corporation
Canyon Reef Carriers Inc.
Chisholm Pipeline Company
Colonial Pipeline Company
Dixie Pipeline Company
Everglades Pipeline Company
Explorer Pipeline Company
Kaw Pipeline Company
Kenai LNG Corporation
LeeFac, Inc.
Papaga Chemicals, Inc.
Powder River Corporation
Phillips Gas Supply Corporation
Phillips Pacific Chemical Company
Salk Institute Biotechnology Assoc.
Seadock, Inc.
Seaway Pipeline Inc.
Texas Offshore Port, Inc.
Transatlantic Reinsurance

White River Shale Oil Corporation

SHELL OIL COMPANY

Basin Pipe Line System
Bullenbay Marine Services, N.V.
Butte Pipe Line Company
Capline System
Capwood Pipe Line System
Crown-Shell Baytown Feeder Line System
Curacao Oil Terminal N.V.
Dixie Pipeline Company
East Texas Salt Water Disposal Company
Explorer Pipeline Company
Gravcap, Inc.
Inland Corporation
LOCAP, Inc.
LOOP, Inc.
Oil Companies Institute for Marine Pollution Compensation Limited
Olympic Pipe Line Company
Ozark Pipe Line Company
Plantation Pipe Line Company
Rancho Pipe Line System
Royal Dutch Petroleum Company
Seadock, Inc.
Shell Petroleum, N.V.
The "Shell" Transport and Trading Company, Limited
Ship Shoal Pipe Line System
Thums Long Beach Company
West Shore Pipe Line Company
Wolverine Pipe Line Company

STANDARD OIL COMPANY (INDIANA)

Amoco Canada Petroleum Company, Ltd.
Amoco Credit Corporation
Amoco Oil Holdings, S.A.
Amoco Pipeline Company
Amoco (U.K.) Exploration Company
Analog Devices, Inc.
Cetus Corporation

Chicago Bank of Commerce
Cyprus Mines Corporation
Solarex Corporation

SUN COMPANY, INC.

Advanced Computer Techniques Corp.
Alaska Bulk Carriers, Inc.
Alberta Gas Trunk Line Co., Ltd.
Anacomp Inc.
Analogic Corp.
Anderson Jacobson Inc.
Applied Data Research Inc.
Applied Devices Corp.
Astro Systems, Inc.
Automatic Data Processing
Aydin Corp.
Becton, Dickinson and Co.
Blackfeet Indian Riding Co. Inc.
Bradford National Corp.
Business Development Corporation of North Carolina
California Microwave Inc.
Canyon Reef Carriers, Inc.
Cape Fear Industries
Carnduff Gas Limited
Christy Chrysler Plymouth, Inc.
Coleman American Co.'s Inc.
Communications Industries Inc.
Compuscan Inc.
Compuserv Network Inc.
Computer Communications Inc.
Computer Consoles Inc.
Computer Horizons Corp.
Computer Network Corp.
Computer Products Inc.
Computer Sciences Corp.
Computer Task Group Inc.
Computer Usage Co. Inc.
Comshare Inc.
Comtech Telecommunicatcns Corp.

Cullinane Corp.
Data Dimensions Inc.
Datapoint Corp.
Datatab Inc.
Deepsea Ventures, Inc.
East Texas Salt Water Disposal Co.
Electronic Data Systems Corp.
Explorer Pipeline Co.
General Datacomm Industries Inc.
Glacier Bay Transportation Corp.
Goldsboro Industries Inc.
Harris Corp.
Hemisphere Oil Co. Inc. (a Puerto Rican Co.)
Industries for Tulsa, Inc.
Inland Corp.
Insyte Corp.
International Biomedical Instruments Inc.
International Fuel Corp.
IPS Computer Marketing Corp.
Itel Corp.
Japan Sun Oil Co., Ltd.
Keane Associates Inc.
Key Data Corp.
Lavan Petroleum Co.
Liberia Refining Co.
Liberian International American
License Royalty Corp.
Log Com Inc.
Lugrasa, S.A
Lumberton Development Co.
Mid-Valley Pipeline Co.
Mini-Computer Systems Inc.
National Data Corp.
Newton Grove Development Corp.
Nottingham Gas Limited
Nuestro Publications, Inc.
Oil Insurance Ltd.
Oklahoma Business Development Co.

Pembalta Gas System No. 3 Ltd.
Pembalta Gas System No. 4 Ltd.
Penril Corp.
Pentagon Industries
Petromech SDN Bhd.
Pilot Freight Carriers
Planning Research Corp.
Plantronics Inc.
Prime Computer Inc.
Programming & Systems, Inc.
Progress Venture Control Corp.
Quotron Systems Inc.
Rapidata, Inc. New York
Raub Supply Co.
Redwater Water Disposal Co. Ltd.
Reynolds & Reynolds Co.
Scientific-Atlanta Inc.
Scientific Computer Inc.
Shared Medical Systems Corp.
Solartech Ltd.
Solcar Properties Inc.
Southeastern PA. Development Fund
Sultran Ltd.
Sun-Canadian Pipe Line Co. Ltd.
Sun Hydroponics
Sun International Finance Co. New York
Sun International Limited
Suncorp Inc.
Sunray Nigeria Oil Co., Ltd.
Sunoco De Chile Ltda.
Sunoco Overseas Ltd.
Sunolin Chemical Co.
Telesciences Inc.
Texoma Pipe Line Co.
The VLM Corp.
Tymshare Inc.
United Telecommunications Inc.
URS Corp.

Van Salt Water Disposal Co.
Venezoil Ca.
Warbonnet Co.
West Texas Gulf Pipe Line Co.
White River Shale Oil Corp.
Wyly Corp.
Zion Investment Associates, Inc.

TEXACO INC.

Refineria Texaco de Honduras, S.A.
Texaco Agro-Industrial (Nigeria) Limited
Quimica Industrial "FIDES" S.A.
Texaco Canada Inc.
Public Fuel Transmission Systems Limited
The Great Eastern Oil & Import Co. Limited
Texaco Norway A/S
Deutsche Texaco Aktiengesellschaft
Texaco Portugal Prospeccaoe Producao, S.A.R.L.
Texaco North Sea Norway A/S
Texaco Gabon
Texaco Togo
Zaire-Texaco S.A.R.L.
Texaco Nigeria Limited
Texaco-Cities Service Pipe Line Company
Tadlaqaz S.A.
American Overseas Petroleum Limited
Bunkerservice Brunsbuttel G.m.b.H.
Societe Ivoirenne De Futs et D'Emballages
(Sifembal) (See Texaco Cote D'Ivoire)
Societe Guineenne De Lubrifiants et D'Emballages
(SOGUILUBE) (See Texaco Africa Ltd.)
Caltex Petroleum Corporation
Australian Lubricating Oil Refinery Limited
Phoenicia Oil Company S.A.L.
Botany Bay Tanker Company (Australia) Pty. Limited
Sydney Metropolitan Pipeline Pty. Limited
Koa Oil Company, Limited
Mediterranean Refining Company
Nippon Petroleum Refining Company, Ltd.

Tokyo Tanker Company, Limited
Caltex Deutschland G.m.b.H.
Caltex Mediterranean Limited
Condea Chemie G.m.b.H.
Federated Pipe Lines Ltd.
Flexibox G.m.b.H.
LPG de Panama, S.A.
Pembroke Capital Company Inc.
P.T. Caltex Pacific Indonesia
Petrogas, S.A.
Texaco Maroc
Societe Ivoirienne D'Avitaillements Portuaires (S.I.A.P.)
Societe Ivoirienne D'Entrepasage De Produits Petroliers (S.I.E.P.P.)
Badger Pipe Line Company
Bayonne Industries, Inc.
Canyon Reef Carriers, Inc.
Colonial Pipeline Company
Coltexo Corporation
Dixie Pipeline Company
Explorer Pipeline Company
Felix Oil Company
Kaw Pipe Line Company
Laurel Pipe Line Company
LOCAP Inc.
LOOP Inc.
Olympic Pipe Line Company
Portland Pipe Line Corporation
Texas-New Mexico Pipe Line Company
THUMS Long Beach Company
West Shore Pipe Line Company
Wolverine Pipe Line Company
Wyco Pipe Line Company
Aircraft Fuel Supply B.V.
Airport Refueling Services S.p.A.
Aktiebolaget Svensk Petroleumlagring
Alberta Products Pipe Line Ltd.
Arabian American Oil Company

The Associated Octel Company Limited
Aviation Fuel Services Ltd.
Boral Limited
The New Zealand Refining Company Limited
South Africa Oil Refinery (Proprietary) Ltd.
Batangas Land Company Inc.
Changi Airport Fuel Hydrant Installation Pte. Ltd.
Ndola Oil Storage Company Limited
Central African Petroleum Refineries (Private) Ltd.
East African Oil Refineries Limited
H. C. Sleigh Limited
Pakistan Refinery Limited
Societe Malgache de Raffinage
Societe Reunionnaise d'Entreposage (S.R.E.)
Cia. Refinadora Petrolera Santo Domingo Inc.
Deutsche Transalpine Olleitung GmbH
Forenade Svenska Oljeimportorers AB
Frevlig A.G.
Gas Natural Colombiano S.A.
Ghana Bunkering Services Limited
Iranian Oil Participants Limited
Iranian Oil Services (Holdings) Limited
Irish Refining Company Limited
Maghreb Gaz S.A.
Mainline Pipelines Limited
Miland Airport Refueling Services, S.p.A. (MARS)
Mitsui-Texaco Chemicals Co., Ltd.
Montreal Pipe Line Company Limited
N.V. Rotterdam Rijn Pijpleiding Maatschappij
Oberheinische Mineralolwerke G.m.b.H.
Pars Investment Corporation
The Pipelines of Puerto Rico, Inc.
Raffinerie du Sud-Ouest S.A.
Refinery Services Company S.A.
Rheem del Ecuador C.A.
Rhein-Mein Rohrleitungstransportgesellschaft m.b.H.
Saudi International Petroleum Carrier Ltd.
The Sierra Leone Petroleum Refining Company Limited

Skandinaviska Raffinaderi Aktiebolaget Scanraff
Societa Italiana per l'Oleodotto Transalpino S.p.A.
Societa per Azioni Raffineria Padana Olii Minerali (SARPOM)
Societe Africaine de Raffinage S.A. (SAR)
Societe Anonyme de la Raffinerie des Antilles (SARA)
Societe D'Entreposage de Bobo-Dioulasso
Societe Camerounaise d'Entreposage (SCE)
Societe Dakaroise d'Entreposage S.A. (SDE)
Societe d'Entreposage de San Pedro S.A. (SESP)
Societe d'Entreposage Petrolier au Burundi S.A.R.L. (SEP-BURUNDI)
Societe De Manutention Des Carburants Aviation Dakar-Yoff (SMACADY)
Societe Gabonaise de Raffinage (SOGARA)
Societe Gabonaise d'Entreposage de Produits Petroliers S.A. (SGEPP)
Societe Tchadienne d'Entreposage de Produits Petroliers S.A. (STEPP)
Societe Togolaise d'Entreposage S.A. (STE)
Svensk Petroleum Forvaltning Aktiebolag
Tankanlage AG Ruemlang (TAR)
Texaco Mexicana, S.A.
Transalpine Finance Holdings S.A.
Transalpine Olleitung in Osterreich GmbH
Trinidad Asphalt Holdings Limited
Trinidad Northern Areas Limited
Trinmar Limited
Trintovac Developments Limited
United Kingdom Oil Pipelines Limited
Unterflur Betankungsanlage A.G. (UBAG)
West Australian Natural Gas Pty. Limited
Zaire Services des Entreprises Petrolieres (Zaire S.E.P.)
Aktiebolaget Djurgardsberg
Association Petroliere Belge
Aviation Fueling Services, S.A.
Aviation Service Center
Compagnie Entreposage Communautaire

Singapore Refining Company Private Limited
Societe Belge de Transport Par Pipeline S.A.
Societe de Cabotage Petrolier S.A.
Societe du Pipeline Sud-European S.A.
Societe Nationale de Raffinage
Svensk Petroleumadministration AB
Total Centrafricaine de Gestion
Societe Agricole des Enterprises Petrolieres
Union des Raffineurs Belges
Svensk Petroleumlagring Tre Aktienbolag
Societe Cameraunaise des Depots Petroleirs (SCDP)
TNPL
AK Chemie GmbH & Co. KG
Bergemann KG
Braunkohle-Benzin AG
Knoops & Muller Mineralolhandel GmbH
Karlsruhe-Stuttgart Rohrleitung GmbH
Bremer Mineralolhandel GmbH
Dannenberg & Co. Mineralolhandel GmbH
Mdina Weave Ltd.
W. Knierim & Co. Mineralolhandel GmbH
Boske & Co. Mineralolhandel GmbH
HoeTex Beteiligungsgesellschaft mbH
Wichmann Beteiligungsgesellschaft mbH
Caluplast Farbenfabriken Wichmann
Zerssen Mineralolhandel GmbH & Co. GmbH
Ful-Tex Euro Services Inc.
Drapol International Limited
Heddington Brokers Limited

Opposition

2

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CLERK

No. 81-1286

In the Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF CALIFORNIA, et al.,

Petitioners,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, et al.,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari

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San Francisco, CA 94120
Of Counsel

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Ninth Circuit's decision vacating the District Court's disqualification order—which barred the confidential relationship between counsel for a defendant corporation and its non-"control group" and former employees who are witnesses or prospective witnesses in this litigation—conflicts with the decision of this Court in *Upjohn Co. v. United States* (1981) 449 U.S. 383?

2. Whether the Ninth Circuit's decision vacating the District Court's disqualification order raises an important question of Federal law which has not been, but should be, settled by this Court?*

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*A list of Socal subsidiaries (except wholly owned subsidiaries) and affiliates is contained in Appendix A, attached hereto.

TABLE OF CONTENTS

	Page
Preliminary Statement	1
Statement of the Case	2
Reasons Why the Writ Should Be Denied	3
I. The Ninth Circuit correctly held that the District Court's disqualification order conflicts with *Upjohn*	3
II. The petition does not raise an important question of federal law which this Court should review	5
Conclusion	6

TABLE OF AUTHORITIES

Cases

	Page
Upjohn Co. v. United States, 449 U.S. 383	passim

No. 81-1286

In the Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF CALIFORNIA, et al.,

Petitioners,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, et al.,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari

PRELIMINARY STATEMENT

We respectfully submit that the Court of Appeals for the Ninth Circuit was correct in vacating the District Court's disqualification of counsel order on the ground that the order impermissibly restricts the attorney-client privilege available to the defendant corporations as set forth in *Upjohn Co. v. United States* (1981) 449 U.S. 383. We further submit that the petition presents no substantial basis for this Court to review the Ninth Circuit's decision.

STATEMENT OF THE CASE

Lawsuits brought by five states and one city alleging violations of antitrust statutes against 17 oil company defendants are consolidated for pretrial proceedings in the United States District Court, Central District of California (MDL-150). The parties are currently engaged in intensive discovery.

On May 28, 1980, plaintiffs moved to compel a former employee of one defendant to answer certain deposition questions which counsel had instructed him not to answer. At the same time, plaintiffs requested the District Court to disqualify all defense counsel from representing non-control group and former employees of the defendant corporations.

On November 12, 1980, the District Court entered an order which disqualified all defense counsel and their law firms from representing any employee (other than a current executive) or former employee of a defendant corporation in the employee's capacity as a witness or prospective witness. That unprecedented order adopted a per se rule of disqualification predicated on the Court's conclusion, unsupported by a factual record, that:

> "• • • there is an inherent conflict in counsel for one of the defendants undertaking to represent a witness who either is or was an employee of one of the defendants unless he is in a high management level position" (Reporter's Transcript of Proceedings in MDL-150, 8/27/80, pp. 14-15).

The District Court held that the attorney-client privilege of the corporation should not apply to communications between corporate attorneys and non-control group employees in their capacities as witnesses or prospective witnesses. For that reason, the Court held it inappropriate

that the attorney-client relationship be preserved between such employees and counsel for the corporation (Pet.Br., App. B, 30a-31a).

While the order was on appeal, this Court held in *Upjohn Co. v. United States* (1981) 449 U.S. 383 that the "control group" test, which limits the attorney-client privilege of the corporation to communications with members of the executive or high-management group, unduly restricts the attorney-client privilege to which a corporation is entitled.

The Court of Appeals, holding that the District Court's disqualification of counsel order was in conflict with the reasoning in *Upjohn,* vacated the District Court's order:

> "In light of *Upjohn Co. v. United States,* 449 U.S. ....., 101 S.Ct. 677, ..., 66 L.Ed.2d 584 (1981), which was decided after the district court entered its order, we are satisfied that the district court would have ruled the other way if *Upjohn* had been decided before the district court had to act" (Pet.Br., App. A, p. 17a).

The Court of Appeals further held that the other considerations relied upon by the District Court—the issue whether counsel "solicited" non-control group employees; the inconvenience to plaintiffs in arranging a pre-deposition interview of a witness who is represented by counsel; and the possibility that counsel might improperly instruct his client not to answer a deposition question—did not warrant the disqualification order.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Ninth Circuit Correctly Held That the District Court's Disqualification Order Conflicts with Upjohn.

In *Upjohn Co. v. United States* (1981) 449 U.S. 383, this Court held that the attorney-client privilege of the corporation extends beyond communications between corporate counsel and "control group" employees. This Court reasoned

that to encourage full communications between corporate counsel and their client, counsel for the corporation must have access to information possessed by all employees whether or not they occupy high management positions:

> "In the corporate context • • • it will frequently be employees beyond the control group as defined by the court below—'officers and agents . . . responsible for directing [the company's] actions in response to legal advice'—who will possess the information needed by the corporation's lawyers. Middle-level—and indeed lower-level—employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties" (449 U.S. at 391).

Implicitly conceding that the rationale of *Upjohn* is contrary to the District Court's order, petitioners erroneously argue to this Court, as they did to the Court of Appeals, that *Upjohn* does not extend the attorney-client privilege beyond the "control group" in the context of pending litigation (Pet.Br., p. 11). But that argument is contrary to the mandate of *Upjohn* that:

> "• • •the narrow 'control group test' • • • cannot • • • govern the development of the law in this area" (449 U.S. at 397).

Upjohn reaffirmed that the privilege promotes not just sound legal advice but also advocacy (449 U.S. at 389).

The need of corporate counsel to communicate in a confidential relationship with employees at all levels of the corporation is in no sense diminished simply because an employee is considered a prospective or actual witness in pending litigation. Indeed, those employees are most likely

to have knowledge of the facts which the corporation must communicate to counsel. It is important that the privilege be maintained during litigation, so that the employees are encouraged to disclose all relevant facts to the attorney, whether the facts be favorable or unfavorable. In this critical respect, by inhibiting privileged communications with those key employees, the disqualification order inhibited the preparation of the defense of the corporate defendants and was properly vacated.

II. The Petition Does Not Raise an Important Question of Federal Law Which This Court Should Review.

Petitioners argue in substance that their petition raises an important question because the decision of the Court of Appeals could be interpreted to preclude a party from discovering *facts* that corporate counsel told the witness. The argument misinterprets the Ninth Circuit opinion and ignores this Court's clear statement in *Upjohn* that:

> "Application of the attorney-client privilege to communications such as those involved here * * * puts the adversary in no worse position than if the communications had never taken place. The privilege only protects disclosure of communications; *it does not protect disclosure of the underlying facts by those who communicated with the attorney* * * *" (449 U.S. at 395) (emphasis added).

All that the Court of Appeals held was that *communications* between corporate counsel and corporate employees may be protected by the attorney-client privilege even though an employee does not occupy a "control group" position with the corporation. It did not pass on the question whether the facts disclosed in such communications were or were not discoverable.

The Ninth Circuit concluded that the District Court erred in disqualifying all defense counsel in response to

what was, in effect, a simple motion to compel one witness to answer certain deposition questions (Pet.Br., App. A, pp. 17a-19a). As the Court of Appeals determined, there was an insufficient factual record to warrant disqualification and several less drastic alternatives were available. Problems which may arise in connection with a witness' refusal to answer questions can be dealt with by the judicious use of sanctions (id.). The trial court may instruct the attorneys on how to conduct the depositions (id.). Costs can be assessed against counsel should vexatious delays be found (id.). Finally the trial court can exercise its contempt power should specific behavior problems be found to have occurred (id.).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Appendix A

Pursuant to Supreme Court Rule 28.1, listed below are the subsidiaries (except wholly owned subsidiaries) and affiliates of Standard Oil Company of California:

Standard Oil Company of California owns stock in the following publicly owned corporations:

Huntington Beach Co.
AMAX, Inc.
Cetus Corp.

Standard Oil Company of California also owns stock in the following corporations: American Overseas Petroleum Limited; Chevron do Brasil Participacoes e Empreendimentos Ltda; Chevron Oil Company of Portugal; Compania de Niguel Colombiano, S.A.; Compania de Petroleo Chevron S.A.; Crest Exploration Limited; First Colony Life Insurance Company; Oil Insurance Limited; P. T. Caltex Pacific Indonesia; Refineria Petrolera de Guatemala-California, Inc.; Windfarms, Ltd.; Caltex Petroleum Corporation.